No. 112.

Brief of Choate for Appellees

Filed Dec. 30, 1898.

Supreme Court of the United States,

OCTOBER TERM, 1898.

No. 112.

CHARLES G. SMITH AND CHARLES G. SMITH, JUNIOR,
Appellants,

vs.

CHARLES BURNETT, SUING ON HIS OWN BEHALF, AND SAID CHARLES BURNETT AND CHARLES G. ENDICOTT, EXECUTORS OF HARRIET E. BURNETT, DECEASED, ET AL.,
Appellees.

BRIEF FOR APPELLEES.

WM. G. CHOATE,
Of Counsel.

INDEX.

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CHARLES G. SMITH and CHARLES G. SMITH, Junior,
Appellants,

AGAINST

CHARLES BURNETT, suing on his own behalf, and said CHARLES BURNETT and CHARLES G. ENDICOTT, Executors of Harriet E. Burnett, deceased, *et al.*,
Appellees.

BRIEF FOR APPELLEES.

Statement.

This is an appeal from a decree of the Court of Appeals of the District of Columbia, affirming a decree of the Supreme Court of the District of Columbia, sitting in admiralty, whereby the appellees, original libellants in the cause, are awarded as damages $9,260, with interest and costs, and a cross-libel filed in the cause by the appellants was dismissed.

Final decree, March 3, 1896, p. 686, fol. 1235.

Decree of Affirmance, April 6, 1897, p. 699.

THE NATURE OF THE ACTION, AND THE ISSUES, AS SHOWN BY THE PLEADINGS.

The original libel was filed on behalf of the owners of the schooner *Ellen Tobin*, to recover damages for a maritime tort (p. 2, fol. 3). It alleges that on the 2d of August, 1893, the schooner sailed from Fort Washington, on the Potomac River, for the port of Georgetown, in the District of Columbia, for the purpose of there being loaded, under an oral contract or oral charter made with the appellants, with about 600 tons of crushed stone, which, by the terms of the contract, was to be loaded by the appellants at a certain wharf in Georgetown then held, together with the water rights and berth connected therewith, by the appellants under lease, and taken to Fortress Monroe and there unloaded by the appellants, at the price to be paid to the schooner of 50 cents per ton; that the schooner was seaworthy and staunch and suitable for the service; that she was taken to the said wharf after the master had been informed by the foreman of the appellants that it contained 14½ to 15 feet of water at low tide, and placed under a chute connected with the works of the appellants on said wharf by which the stone was to be loaded into her hold, and then she was breasted off from the wharf so that this chute could be passed down into her for the purpose of loading (p. 3, fols. 3 and 4); that the appellants, through their foreman and workmen, proceeded to load the vessel, beginning at the after part, and continued their loading till about 400 tons of stone had been loaded upon her and until the afternoon of Saturday, the 5th of August, when that amount had been put on board; that the appellants negligently allowed a natural rock, stones or other substances to remain in said berth under said vessel, so that even with the 400 tons on board, said berth did not contain a sufficient depth of water to float her, and that in consequence thereof she became a total loss; that the loss was caused by the negligence and

want of proper care on the part of the appellants and not from any omission or neglect on the part of the vessel, her owners or masters (p. 3, fols. 4-6). The value of the vessel is stated in the libel to be $10,000, and additional damage is claimed to the amount of $1,240 for pumping out the crushed stone and raising and taking the vessel out of navigable waters, as required by statute (p. 4, fol. 6).

The libel then states the circumstances which excused the delay in the removal of the vessel and the difficulties which the appellees encountered in getting the work of discharging and removing her accomplished (pp. 4 and 5, fols. 6 and 7).

It recites the survey of the vessel on the 1st of November, 1893, by three experienced surveyors, a copy of which survey is annexed to the libel (p. 5, fol. 8; survey, p. 11, fols. 16 to 18). By the survey she was found to be a total wreck.

The libel then states that she was sold at public auction on the 14th of November, 1893, to one of the libellants for $25, who, thereafter, on behalf of the owners, sold her to one John B. Lord for $100, which sum the libellant's offer to have credited against their loss, less the cost of advertisement (p. 6, fol. 8).

Attached to the libel is a copy of the lease of the appellants (pp. 8 and 9); also an agreement on the part of the appellants, dated September 23d, to receive the stone when taken out of the vessel, on payment to the appellants of $40 for the work of handling the stone after being discharged at their wharf (p. 10, fol. 15). This last agreement was without prejudice to the rights of either party in this controversy, except that appellants waive any damages to the stone to be so returned (fol. 15).

The answer of the appellants to the libel, besides putting the libellants to the proof of their ownership and of most of the averments of the libel contains the following denials and admissions:

They deny that prior to the sailing of the vessel from Washington there was an oral contract or

charter for the loading of the schooner (p. 15, fol. 22).

They admit the lease, a copy of which is annexed to the libel (do. do.).

They deny that the vessel was seaworthy, staunch and suitable for the service mentioned (do. do.).

They deny that the master made proper inquiry with regard to the depth of the water in the berth in front of the wharf (p, 15, fol. 23).

They deny that the foreman of the appellants informed the master that there was 14½ to 15 feet of water at low tide or any other number of feet (do. do.).

They admit that after the arrival of the schooner at the wharf the work of putting the stone on board was begun and carried on by the appellants, but they allege that the storage of the same on board and the quantity placed and the distribution of it in the hold were under the sole direction of the master (do. do.).

They admit that a lighter was interposed between the wharf and schooner to keep the schooner breasted out from said wharf, so that a chute for the conveyance of the stone from the crusher could be passed down into the schooner for the purpose of loading her (do. do.).

They admit that the loading began in the after part of the vessel, and that the loading was continued until about five o'clock on the afternoon of Saturday, August 5th (do. do.).

They deny that the bottom of the berth was obstructed by natural rocks, stones or other obstruction which had been negligently allowed to remain by the appellants, and that the back of the schooner was broken by reason of the said obstruction coming in contact with the bottom of the vessel through the careless, negligent, unskillful and improper management of said wharf and berth by said appellants in not keeping said berth free from obstructions.

They deny that the schooner became a total loss to the libellants by reason of the respondents' alleged careless, negligent, unskillful and improper management (p. 16, fol. 24).

They deny the alleged value of the schooner (p. 16, fol. 25).

They deny the damage of $1,240, the alleged cost of removal, in addition to the value of the schooner (p. 16, fol. 25).

They neither admit nor deny the allegations of the libel tending to excuse the delay of the libellants in the removal of the vessel, and require proof (p. 16, fol. 25).

They deny that the survey held was entitled to any consideration (p. 16, fol. 25).

They allege that they had no knowledge or notice of the existence of any dangerous obstruction or of any natural rock or stone at the bottom of the berth or dock of such a character as to threaten or cause injury to any vessel grounding or settling in the berth or dock; they allege that they had caused the dock to be dredged in the spring of 1893, and had exercised proper and usual care in making the berth or dock a safe place for loading a vessel.

They allege that on or about the 2d of August an agreement was entered into by and between themselves and the master, whereby the master agreed to receive at his said wharf and convey to Fortress Monroe a cargo of crushed stone at and for the compensation of 50 cents per ton freight; that the number of tons constituting the cargo was not agreed upon, but was left to the determination of the master in the exercise of his discretion (p. 17, fol. 26); that this agreement contained no guarantee or representation as to the depth of water (p. 17, fol. 26).

They further allege that on Friday, the 4th of August, the schooner being then partly loaded, one of the appellants, Charles G. Smith, Jr., told the master it would be wise for him to sound around his vessel, to make sure that she was lying all right;

that although the dock had been dredged out in the early part of the year, the appellants did not know just what the bottom was, although they thought it was all right, and that he would advise the master to sound, and satisfy himself as to the depth of water; that the loading of the schooner proceeded under the direction of the master until about five o'clock on Saturday afternoon, August 5th, when the tide being nearly low, the master said he was touching bottom slightly, and thereupon the work of loading ceased and was not resumed; that the master said she was all right and he would shove the vessel off at high water, the tide being high at about midnight; that the appellants by their foreman advised and urged the master to shove her off at high tide and place another scow between the schooner and the wharf, and that the foreman prepared and placed in position another scow, to be placed between the schooner and the scow then next to the wharf, and informed the master that if any more stone were taken on board it could be wheeled over the two scows, and that the master then declared that he would shove the vessel off at high tide and place the scow beside her, and requested that the iron chute which carried the stone to the schooner should be removed in order that the schooner might be shoved off, and this was accordingly done by the appellants' employees; that at this time the master said the schooner was leaking; that although the schooner was floating that Saturday night at high tide, no effort was made by the master to shove her off or to interpose the other scow between her and the scow at the wharf then or during the night of Saturday, or to pump the water out of said schooner, or to stop the entrance of water into her hold or to ascertain her position or protect her from injury by leakage and the consequences thereof; that the pumping was begun about half-past eight on Sunday morning, and continued some hours, but the schooner continued slowly to sink until noon on Sunday, when the pumping was stopped

(pp. 17 and 18, fols. 27 and 28); that the sinking of the schooner and all the losses thereby occasioned were caused solely by the negligence and want of skill and care on the part of the said master in not ascertaining the condition of the bottom of the berth or dock, and in not shoving the schooner off into deeper water when advised to do so, and in not placing an additional scow between the schooner and wharf when urged to do so, a scow being provided for that purpose by the respondents, and in not pumping the schooner when found to be in a leaky condition, and in not taking any measures to prevent the vessel from sinking when it was known she was leaking (p. 18, fol. 29).

They further aver, that after the schooner sunk, she was allowed to remain there until November 23, 1893, and during that time no proper or usual means were taken to raise her or prevent her becoming a total loss, although if prompt and skillful effort had been made to raise and repair her, the greater part of the loss would have been avoided (p. 19, fol. 29).

These appellants filed a cross-libel (p. 20) containing many of the averments contained in their answer alleging that the schooner began to leak and sank in her berth on the 6th day of August, by reason of the negligence of the master in not pumping her out, in not placing her in a place of safety; in failing to take proper measures to ascertain the condition of the bottom of the berth, and to avoid the danger of injury which the master would have discovered if he had made proper soundings and examinations of said berth, dock and bottom; that the owners and the master neglected to take proper measures for the raising and removal of the schooner from the dock and berth, and negligently suffered her to remain there from the 6th of August to the 23d of November, 1893 (p. 21, fol. 32), and that she became an obstruction to the use and occupation of the berth and dock, and prevented the loading and unloading of stone therefrom, and increased the cost of loading said stone therefrom, and increased the cost of

getting the stone to the crushers on the wharf to the damage of the appellants of $2,500 (p. 21, fol. 33); that further damage was done by one of the appellants' scows coming in contact with the anchor of the schooner to their damage $200 (p. 21, fol. 33), and the libel claims damages in $2,700 against the original libellants (p. 22, fol. 33).

The answer of the appellees to the cross-libel denies all the allegations of negligence charged against the master and owners of the schooner; denies the damages alleged to have been suffered by the appellants; denies that the injury done by the anchor of the schooner was caused through any negligence on their part; denies any unnecessary delay in removal of the schooner (pp. 25 to 29).

The testimony taken under the pleadings is very voluminous, 70 witnesses having been examined, many of them at great length, and there being on some points great conflict in the evidence, especially as to conversations between one of the appellants, Charles G. Smith, Jr., and the foreman of the appellants, Speaker, and the master. The trial, however, resulted in a decree, as before stated, in favor of the libellants, appellees herein, and by an interlocutory decree it was referred to a special commissioner to assess the libellants' damages (p. 584, fol. 1049).

The testimony taken before the Special Commissioner was also very voluminous. It related especially to the valuation of the schooner, the libellants insisting that she was of the value of $10,000; the respondents, these appellants, admitting and contending that she was worth only a little over $4,000. The Special Commissioner found her value to be $6,000, and allowed the additional damages claimed at $1,240 (Report, pp. 586 to 591).

Both parties filed exceptions to the report, the libellants, appellees herein, claiming that they

should have been allowed $10,000 instead of $6,000 (Libellants' Exceptions, pp. 653 to 658).

The appellants, respondents below, also filed exceptions, among other things, to the allowance of $6,000 for value (pp. 659, 660).

Upon the hearing of the exceptions, the Court, being of opinion that the Special Commissioner had rejected evidence on behalf of the libellants which should have been received, took further testimony in open court (Order, p. 661, fol. 1189; Testimony, pp. 661 to 685), and determined that the value of the schooner was $8,000, as is stated in the final decree (p. 686, fol. 1236).

The respondents, appellants herein, appealed to the Court of Appeals (p. 687, fol. 1237).

The Court of Appeals delivered a carefully written opinion, through Chief Justice Alvey, which discusses both the facts and the law (pp. 694 to 699), and gave judgment, as before stated, affirming the decree below.

The Facts and the Evidence.

The principal questions of fact involved are the following:

1. What was the contract between the parties?

2. Was there a natural rock or other obstruction in the berth in which the vessel was placed to receive her cargo, rising above the level of the bottom at that place, so as to be dangerous to the vessel two-thirds loaded grounding on it?

3. Was the wreck of the vessel caused by this rock?

4. Was the vessel staunch, strong and seaworthy?

5. Had the appellants knowledge or notice of this obstruction in the berth, or were the circumstances such that it was negligence in them not to know of it?

6. Was the master chargeable with contributory negligence, which tended to produce the loss and damage, as charged in the answer, either

1st. In not ascertaining the condition of the bottom of the berth or dock (Ans., p. 18, fol. 29); or

2d. In not shoving the schooner further away from said wharf when advised to do so, and in not placing an additional scow provided for that purpose by appellants between the schooner and wharf (Ans., pp. 18 and 19, fol. 29); or

3d. In not pumping said schooner when found to be in a leaky condition (Ans., p. 19, fol, 29); or

4th. In not taking any measures to prevent said vessel from sinking, when it was known she was leaking (Ans., p. 19, fol. 29)?

7. Are the appellees, the owners of the vessel, chargeable with negligence in not more promptly raising and removing her, which aggravated the damages.

I.—*Of the contract between the parties.*

The contract alleged in the libel is virtually admitted in the pleadings of the appellants.

The libel alleges an "oral contract or oral charter" made by the appellants, through one Joseph H. Lee, with the master, and that the schooner sailed from Ft. Washington on the 2d of August for Georgetown, "for the purpose of there being loaded, under said contract or charter, with about 600 tons of crushed stone, which was to be loaded on her by the appellants at their wharf and discharged by them at Ft. Monroe" (fols. 3 and 4). "The appellants deny *that prior to the sailing of the schooner*

from Fort Washington they made any oral contract or charter for the loading of said schooner, as charged in said second article of said libel" (fol. 22). They also deny *that her being towed to Georgetown* was done in accordance with any oral charter (do.). They expressly allege, however, that on or about *August* 2, 1893,. an agreement was entered into between them and the master, whereby the master agreed to receive and convey to Ft. Monroe a *cargo* of crushed stone at and for the compensation of fifty cents per ton for freight (fol. 26). They add that the number of tons to constitute the cargo was not agreed upon, but was left to the determination of the master in the exercise of his discretion. They add also that the oral agreement contained no representation or guaranty as to the depth of water, the position of the schooner at the wharf or the time and manner of receiving the cargo or storing it or the quantity to be received, all of which they say were under the exclusive direction and control of the master (fols. 26, 27).

In the cross-libel, however, they allege that "on the 2d of August the schooner, *then being in the port* of Georgetown, then *leased and in the possession of libellants* (*i. e.* the appellants herein), and being commanded by one Hankins, master, an oral agreement was made by and between the libellants and the said master, acting on behalf of the owners of the schooner, by which the master agreed to receive at their wharf and to convey to Ft. Monroe a cargo of crushed stone at and for the compensation of fifty cents per ton" (p. 21, fols. 31, 32).

They do not deny that the contract was made as alleged by the appellees, through Lee. The evidence, however, is that the master made the contract, whatever it was, with Lee, and did not see either of the appellants till the day after the schooner begun to load, which was August 3d.

It is not claimed by the appellees that the oral contract contained anything expressly about the number of tons, or any guaranty about the depth of

water, or the position of the vessel at the wharf. It was simply an agreement to bring the vessel to the wharf to be loaded by the appellants, to convey the stone to Ft. Monroe, to be there by the appellants discharged. They do claim that representations were made by Lee about the depth of the water in conversation with the master at or about the time of making the contract and by the appellants afterwards. It is not, however, claimed that these representations were part of the contract by which the vessel was chartered or leased, as the cross-libel has it, to the appellants.

The admission is that the contract was for a *cargo*. This plainly means such amount as the vessel could properly take for carriage. It means a full cargo, considering the capacity of the vessel, not a part of a cargo.

The carrying capacity of the schooner was about 600 tons, the amount stated in the libel.

And it would seem that the refusal of the master to take or of the appellants to put on board substantially a full cargo would be a breach of the contract, as admitted.

Whether the schooner was *chartered* by the appellants or not is also immaterial. The cross-libel alleges that she was *leased* and in their possession. This is an admission that she was chartered by them.

But while there is no real question made by the pleadings as to the contract, yet when we come to the evidence, the appellants tried to raise such question, and the testimony of Charles G. Smith, Jr , one of the appellants on this very subject is such as to raise sharply the question of his general credibility, a question which the courts below had to consider, not only with reference to this subject, but with reference to many other more material parts of the evidence.

It having appeared that the master never met either of the appellants till after the 2d of August,

and that the conversation which resulted in the contract, admitted in the answer, was between the master and Lee alone, Smith as a witness sought to repudiate Lee's authority to act for him, and to deny that the appellants ever made any contract with the master (p. 292, fol. 515; p. 293, fol. 517; p. 330, fol. 586; p. 331, fol. 588; p. 332, fol. 590), and this in spite of the fact that vessels sent there by Lee were received and loaded by appellants, and with no other agreement than that Lee had engaged and sent them, on being notified that appellants had stone to ship, and agreed with the captains upon the rate of freight they were to receive (*Lee*, p. 86, fol. 137; p. 81, fol. 128; p. 82, fol. 130).

II.—*There was a rock or obstruction in the berth assigned to the vessel by the appellants projecting above the bottom of the river, and endangered her safety even in her partially loaded condition.*

The schooner being towed to Georgetown on Wednesday, the 2d of August, was moored at a wharf adjoining Smith's to await an opportunity for receiving her cargo, and just before they quit work on August 2d, the berth being vacant, she was hauled down, and with the help of Mr. Speaker, the appellant's foreman, and his employees, placed in her berth so that the chute from the crusher could deliver the stone into her after hatch. She lay outside of a scow or lighter, breasted off from the wharf, so that a lighter could be moved in and out between the schooner and the wharf (*Hankins*, pp. 45, 46, fols. 70, 71). She remained in this position all day Thursday and until about 2 o'clock Friday afternoon when she was hauled so as to bring the chute over the forward hatch (pp. 46, 47, fols. 72, 73; p. 66, fol. 104). She lay there receiving cargo all the rest of Friday after being hauled, and all day Saturday till about 5 o'clock in the afternoon (pp. 47, 48, fol. 73). Her regular full cargo was 575 tons of coal, or 600 tons of stone (p. 45, fol. 69). The estimated amount

of stone which the crusher could deliver per day, as stated to the master by Charles G. Smith, Jr., one of the appellants, was 150 tons (p. 46, fol. 72), and she had received by Saturday at 5 o'clock about 400 tons. They worked the after hatch from the beginning of work on Thursday to 2 o'clock Friday (p. 66, fol. 104), and the fore hatch from 2½ or 3 o'clock Friday to 5 o'clock Saturday.

When she went into her berth she drew 7 feet forward and 7 feet 10 inches aft (p. 60, fol. 93). On Friday, at 2½ o'clock in the afternoon, that is, just before she changed from the aft to the fore hatch, she drew 13 feet aft and about 8½ feet forward (p. 60, fol. 94). As they worked the forward hatch she was coming up on an even keel (p. 60, fol. 94). On Saturday, when they knocked off, she drew 12 feet 10 inches forward and 10 feet 10 inches aft (p. 61, fol. 95). This would make her drawing about 11 feet 10 inches amidships. This was about low water. The master thought she was on something because she was nearly two feet by the head (p. 62, fol. 97; p. 66, fol. 104), but he was reassured by the foreman, who said she was not (p. 47, fol. 73; p. 62, fol. 98), and then the master sounded on both sides and found not less than 12 feet on the inside aft and not less than 15 feet forward, from 14 to 17 or 18 feet. He found all around her more water than she drew. This convinced him she was afloat (pp. 62, 63, fols. 97, 98). As she lay she was 20 to 24 feet from the wharf, breasted off a little more at the stern than forward (p. 63, fols. 98, 99). Her length of keel was 125 feet; her width 32 feet (p. 75, fol. 118). On Saturday after they stopped work they pumped her out and found no water in her (*Hankins*, p. 62, fol. 97; p. 48, fol. 75; p. 55, fol. 86). In this the captain is confirmed by the crew. She sucked at 25 strokes as usual (*Barkley*, p. 31, fol. 47; *Stevens*, pp. 262, 263; *Thompson*, p. 267, fol 470). On Sunday morning, August 6th, the captain, about 7½ or 8 o'clock, discovered that she was leaking on trying the pumps (p. 68, fol. 107).

He tried to breast her off and could not and found she was not afloat. She was still by the head (p. 68, fol 108). The captain got up a little after 6 Sunday morning (p. 70, fol. 110). He took note of the condition of the vessel. She still drew the same forward and aft as the evening before. They had breakfast about 7 o'clock and after breakfast tried the pumps and then first found her leaking. There was not a great deal of water in her but it was coming in faster than it could be pumped out. He saw the leak in the seams of the centre board well (*Hankins*, pp. 48, 49, fol. 75; p. 61, fol. 96; *Slevens*, pp. 264, 265; *Thompson*, p. 268, fol. 472). By the almanac the tide was low Sunday morning about or a little before 9 o'clock (p. 460, fol. 833). When they began to pump and discovered the leak therefore it was within about an hour of low tide. The tide there rises and falls about 3 to 3½ feet, which is about 3 inches to the hour.

From the time the leak was discovered she gradually filled with water, settled down and in settling down her bottom for about 40 feet in length and over 20 feet in width amidships was broken and shoved up and that shoved up her decks, and the mainmast, about three feet, and her bow and stern fell till they came to their bearings on the bottom. This alone would seem to be conclusive proof that at a depth of not exceeding twelve feet below water at low tide under the centre of the vessel there was an obstruction high and large enough to break in the bottom under the strain of the weight of the vessel and the two-thirds of a cargo she had on board.

But further proof of the existence of the obstruction was afforded by the testimony of a diver who was sent down after the vessel was removed and who testifies to examining the bottom and finding a long ridge of natural rock corresponding to the break in the bottom of the vessel, and about five feet high. And while the diver was at work the master in conjunction with him and an assistant measured the

depth from the surface of the water at high tide to the highest point of the rock, and found the depth to be between thirteen and fourteen feet (*Pierson*, pp. 89 to 92; *Harp*, pp. 103, 104; *Hankins*, p. 74, fols. 116-117).

To meet this evidence the appellants some months afterwards sent down other divers, who reported and testified that they could not find any such rock; subsequently the appellees sent down divers again, who testified that they found the rock, but broken, and apparently exploded on the top, and reduced in height from about five feet to about three feet (*Wanser*, p. 395, fol. 710; *Patry*, p. 408, fol. 705; *Broom*, pp. 471-474; *Pierson*, pp. 475-476; *Olson*, 476-479; *Broom*, pp. 504-508; *Atlee*, pp. 522-527; *Hagner*, pp. 563, 564).

It seems to be of little importance whether the rock was five feet high or three feet high. It would be equally dangerous at either height. The estimates of the divers as to height were necessarily only approximate.

But there is still other evidence that the bottom of the vessel was broken in by some such obstruction. A photograph of the vessel was taken in January, 1894, where she was taken out on the marine railway at Alexandria. The indentation is still very obvious, showing the nature and position of the force applied to her bottom (photo. opp. p. 149).

There is also the testimony of the three surveyors, who examined her as she lay sunk, and one of them afterwards on the ways at Alexandria, and of the ship carpenters who rebuilt her, all of whom described the injuries and gave their opinion as to the manner in which the injury was effected (*Agnew* pp. 164-172; *Davey*, pp. 181-184; *Gokey*, pp. 131-135; *Kensel*, pp. 125-131; *Berry*, pp. 258-261; *Fox*, pp. 534-542; *S. W. Smith*, pp. 551-559).

There seems to have been abundant proof, therefore, that in the berth, where she lay receiving her

cargo, there was a natural rock protruding above the level of the adjoining bottom, on which she grounded at or near low tide, and that she was wrecked by sinking on this obstruction.

After all the evidence was taken before a commissioner, the appellants got leave to introduce in evidence a government map or chart of soundings, dated in 1884, purporting to be taken at distances of five feet each way and covering this berth (*Averill*, pp. 578-584; Exhib., p. 584). Satisfactory proof, however was not made of the actual soundings represented on the paper, and even with such proof, and assuming that the map does not distinctly show the rock described by the divers, the proper conclusion would be that the map was defective and erroneous, weighed against the great mass of evidence in support of the appellees' contention in this case that there was such a rock; the proof by Averill and the map did show a rocky bottom with many and sudden inequalities making a very unsafe berth for vessels.

There is also proof that at a very low tide in the winter before the *Tobin* sunk there, another vessel of about the same size, grounded at the same place, and her keel about amidships was bruised and broken. She was held as on a pivot about amidships. She was being loaded under the same chute in the same berth (*Cole*, pp. 270-284).

There is also evidence hereinafter more fully stated tending strongly to show that both Chas. G. Smith, Jr., and his foreman, Speaker, were well aware of the existence of some serious obstruction in that berth (*infra*, Point V., pp. 22, 23, 38).

III.—*The wreck of the vessel was caused by this rock.*

IV.—*The vessel was staunch, strong and seaworthy.*

These two questions of fact may well be considered together, because while the existence of the

rock or obstruction in the dock sufficiently accounts for the destruction of the vessel, yet the alternative contended for by the appellants on the trial was that the vessel was old, weak, leaking and unseaworthy, and that this was the cause of the wreck.

The evidence that the vessel was staunch, strong and seaworthy and fit for the service which she undertook, is conclusively shown by several independent lines of proof. She was built in 1874, and was consequently 19 years old, but she had been always kept in good condition by her owners. She had never been a leaky vessel. Her timbers were larger than are ordinarily placed in a vessel of her size (*Burnett*, p. 185, fol. 320; *Endicott*, p. 210, fols. 363, 364).

These two witnesses had been familiar with her from the beginning. She had just delivered without injury a cargo of 3,200 barrels of cement at Fort Washington, on a voyage from New York. There was no leakage during that voyage (*Hankins*, p. 44, fol. 68; p. 56, fol. 87; *Stevens*, p. 262, fols. 460-462; *Thompson*, p. 267, fol. 469).

Captain Hankins had run her as master for nine years (p. 56, fol. 86). He testified positively to her being in good condition, not leaking and staunch and seaworthy (do. do.).

Twiford, who was mate on her from June, 1893, till she was wrecked, testifies to the same effect (p. 136, fols. 228, 229, 230). He gives the number of barrels of cement 3,200 (p. 137, fol. 230; p. 142, fols. 239, 240; p. 146, fol. 247).

As shown herein (*supra*, p. 14), she did not leak Saturday night, although it is probable that she touched on the rock at the low tide of Saturday evening. Many persons experienced in the examination of vessels, shipowners, ship carpenters, &c., examined her, both while she was sunk and after she had been raised and taken to the shipyard at Alexandria. They all concurred in stating that she was a remarkably strong, sound vessel, with nothing about her to make her leak except the injury

received to her bottom when sunk at the appellants' wharf (*Agnew*, pp. 164, 165, fols. 181, 182; p. 166, fols, 283, 284; p. 167, fols. 285, 286; p. 168, fols. 287, 288).

Mr. Agnew, who was one of the three persons who joined in the official survey, expressed the opinion that she would have gone to pieces on encountering the obstruction in the berth at Georgetown if she had not been so strong a vessel; that she was very strongly built (p. 168, fol. 287); that the nature of the injury showed that she rested upon an obstruction or rock as upon a pivot and this caused her being crushed through as she was (p. 170, fol. 291); that vessels twenty five or thirty years old, if kept in good condition, may be perfectly sound (p. 171, fols. 292, 293).

Kensel, another of the surveyors, a man of great experience in such matters and who had known her ever since she was built, and saw her during the summer the year before the disaster, took part in the survey while she was lying sunk at the dock, and saw her also there in August, testified that she had been well kept up, describes her condition as sunk at the dock, and had known of her being out of the water at Jersey City to be overhauled half a dozen times (pp. 125 to 131). He states that as she lay at the wharf when the tide was out her upper deck was out of the water, but when the tide came in her upper deck would have water on it (p. 130, fol. 218).

William Gokey, the third surveyor, was also called as a witness. He testified that he had repaired the schooner for the last ten or twelve years, with the exception of once or twice; that she was a sound, staunch vessel when he put her off of his dock two years before; that ever since he had known her she had been well kept up, twelve or fourteen years. He describes her condition at the time of the survey and described the bursting up of her decks amidships (pp. 131 to 135).

These three surveyors unite in pronouncing her a

total wreck as she law sunk, not worth taking as a gift. Mr. Gokey thought that it would be worth $1,000 to take her in the condition in which she was. Their judgment is confirmed by the fact that upon the sale of the wreck, which was well advertised, the only bid for her was that of Captain Endicott, for $25, except that one bidder for $30 failed to complete his purchase, and she was put up again and was knocked down for $25 (*Darr*, pp. 252, 253; *Agnew*, p. 256, fol. 450).

The subsequent history of the vessel also shows that the judgment of the surveyors was right. She was purchased from Mr. Endicott, who bought her for the owners, for $100, by John B. Lord, who gave a bond in $5,000 to secure her removal from navigable waters. He traded her off to the Marine Ship Railway and Coal Company of Alexandria, upon terms which made the price paid for her about $1,000. They traded her off to one Curtis, who rebuilt her. He changed her from a centreboard vessel to a keel vessel, the difference in expense being about $1,000 in favor of the keel vessel, and she has cost $11,000, including her sails, rigging and paint. It cost $1,200 to get the stone out of her before she could be sold (*Lord*, pp. 149-151, 154, fol. 263; *Agnew*, p. 165, fol. 282; *Curtis*, pp. 531, 532, fol. 955).

The surveyor and agent of the American Shipmasters' Association, under whose inspection she was rebuilt for Curtis, testified that she was a very strongly built vessel; that the timbers were larger than he had ever seen in a vessel of her tonnage; that there was nothing in her condition to indicate that she was a leaky vessel, apart from the injury caused by the obstruction on which she sunk (*Fox*, pp. 534 to 539). *Berry*, the ship-carpenter who rebuilt her for Curtis, under the inspection of Fox, testified that her planking was sound (p. 259, fol. 455), and when recalled as a witness on behalf of the appellants after he had made the repairs, testified that she was a good vessel – timbers, planking,

bottoms and everything, sound—keel, sound as a dollar; that there was some rotten wood above deck, a little round the rail, and such as that, but that down below, her timbers were very sound and the planking on her was very sound (p. 455, fol. 823).

The appellants attempted to show that she had some soft places in her seams or butts and that some spikes had corroded, attempting thus to show that she was a leaky vessel before the disaster. It was, however, shown by the evidence of the witnesses above referred to that so far as these appearances in her condition months after she was sunk and after she had been a long time first lying in the mud and afterwards drying on the marine railway, had any semblance of truth, they did not show that there was any defect before the disaster which would cause her to leak. And the positive evidence above referred to that she was a perfectly tight vessel up to the time of the disaster, shows that the conclusions of the appellants' witnesses from such appearances were erroneous.

See also the testimony of the superintendent of the shipyard at Alexandria (*S. W. Smith*, p. 552, fols. 989, 990, 991; p. 555, fol. 994; p. 560, fol. 1001; *E. G. Lord*, p. 565, fol. 1011).

It was proven, therefore, by a great preponderance of evidence, that the disaster that happened to the vessel was caused by her grounding upon an obstruction or rock in the berth not having sufficient depth of water even in her partially loaded condition, drawing about 12 feet, and that it was not caused by any defect or want of seaworthiness in the vessel herself, which was conclusively proven to be staunch, strong, tight and seaworthy.

V.—The appellants had knowledge or notice of this obstruction in the berth and, in any event, the circumstances were such that it was negligence in them not to know of it.

The appellants Charles G. Smith and Charles G. Smith, Junior, constituting the firm of Charles G.

Smith & Son, operate the quarries of the Potomac Stone Company. They there carried on the business of crushing stone and loading and unloading vessels and scows. Prior to August, 1893, they had been carrying on this business for over three years, shipping stone to various points, and especially under contracts with the Engineer Department of the Government at Fortress Monroe (*Smith*, pp. 291, 292). The business was a very large one. During the year 1893 alone, before the accident to the *Tobin*, they loaded from 15 to 20 vessels at the same place (p. 255, fol. 520). The capacity of the crusher for loading vessels through the chute was from 150 to 200 tons a day. Charles G. Smith, Junior, lived in the City of Washington. The firm leased about two miles and a half of river front, part quarries and part that had not yet been opened. They employed from 150 to 300 men; at times, 500 or 600. Besides the machinery for loading vessels through the chute, they had bins into which they ran the crushed stone to be carried off in other ways. Charles G. Smith, Junior, was at the wharf attending to business nearly every day (*Smith*, pp. 291, 292; p. 295, fol. 520; p. 303, fol. 535; p. 304, fols. 537, 538; p. 305, fol. 539; p. 307, fol. 543; p. 309, fol. 547; p. 311, fol. 550; p. 319, fol. 565).

The appellants had direct notice of this rock in December, 1892. In that month the *Francis R. Baird*, Cole, master, was at that same berth loading with stone. She was a two-masted schooner carrying 500 tons, and, when loaded, drawing 14 feet (*Cole*, p. 270, fol. 475). After loading, off and on, two or three days, and drawing 12½ feet, she grounded. When her master first noticed it she was raised out of the water about 8 inches (p. 271, fol. 477). The captain sounded with a pole. He thrust it down by the keel, and it sounded hard like a rock. He had Charles G. Smith, Jr., one of the appellants, called, and he shoved the pole down in his presence, and Smith admitted it sounded like rock (p. 273, fol. 480). Then Smith proposed hauling her off with a

tug. They hauled on her bow and pulled it a little, and her stern swung the other way. Smith proposed hauling on her stern. They tried it, and hauled her stern, and the bow went the other way. She went round as if on a pivot (pp. 273, 274, fol. 481). There was a heavy westerly wind, and the water kept falling so that she was finally three feet out of water drawing only nine feet as she lay aground (p. 274, fol. 481). When the wind went down and the tide returned she floated and they hauled her further out (p. 279, fol. 490). They afterwards put in another scow to put on more cargo (p. 279, fol. 491; p. 280, fol. 492; p. 282, fol. 496). The injury done to the vessel then visible was that some of her deck beams were broken, and while on the rock she was bulged up, but she did not leak (p. 274, fol. 482). When taken out of the water it appeared that an eight-inch shoe was jammed off for 20 or 30 feet and the keel was damaged (p. 280, fol. 492). Smith went below and examined the beams (p. 275, fol. 483). Her master had some controversy with Smith about damages, but was glad to get away as he was liable to be kept in the ice all winter—and accepted from Smith payment of part of the cost of towing him below the ice (p. 275, fol. 483; p. 277, fols. 486, 487).

This affair of the *Baird* was direct notice to Smith and the foreman that there was a dangerous rock in the berth. Smith does not, in his testimony, deny the conversations testified to by Capt. Cole about sounding and hitting the rock under her, or the hauling on her with the tug. He admits going down to look at her beams.

There are other circumstances strongly indicating that both the foreman and Smith knew there was something in that berth making it unsafe for a vessel like the *Tobin*, drawing 14 feet, to complete her loading there. It is proved that while small vessels completed their loading there, vessels like the *Tobin* were breasted further off by putting a second scow between them and the wharf and putting

the last part of the cargo on by wheeling it in wheelbarrows across the two scows. This they certainly would not have done if it had not been necessary, for it prevented the use of the wharf in unloading stone for the crusher, and by Smith's own statement it cost them about 20 cents a ton more to load that way (*Smith*, pp. 306, 307, fols. 541, 542; p. 309, fol. 548; p. 310, fols. 548, 549). Smith also says that he told the captain that he finished loading the *Sunlight* in that way (p. 313, fol. 555), and that he told the foreman on Saturday morning that if the captain wanted a pole to shove him off or another scow, to give him that (p. 313, fol. 554). In a memorandum prepared by Smith for his counsel about the time of the injury to the *Tobin*, which purports to state not only facts within his own knowledge, but facts derived from other sources, and which was introduced against appellees' objection (pp. 331, 332, fols. 589, 590), he says: "Several men were pumping vessel during Sunday morning, and it does not appear that the vessel sunk *on the rock* until she had made some water" (p. 468, fol. 846). This is a plain admission that he then, immediately after she sunk and long before there was any examination by divers or otherwise under the vessel, knew that it was a *rock* on which she had been wrecked in the berth.

That statement also refers to the case of the *Sunlight* being partly loaded breasted out with two scows, and shows an evident expectation that the further loading of the *Tobin* would be done in the same way. The pretense which appears in the statement and also throughout the testimony, that this shoving out of vessels like the *Sunlight* and the *Tobin* was because the captains wished it and not because it was a necessary precaution on account of insufficient depth of water, is very absurd.

In view of this admission in the statement and the direct notice of the case of the *Baird*, Smith's testimony that he had "no notice from any one," and "no knowledge of any rock or obstruction that would

damage a vessel," is unworthy of belief. It certainly discredits him as a witness (pp. 302, 303, fol. 534).

Charles G. Smith, Senior, whose knowledge of the condition of his own premises is equally to be presumed, and whose want of knowledge it was equally important for appellants to show, was not called. The case of the appellants on this point is not improved, but rather damaged by the fact that they had the dock dredged out in the spring of 1893, after the *Baird* was injured and before the *Tobin* was wrecked.

Somers, the dredger, who testifies to making the bargain for dredging with Smith, Jr., testified that there was no depth specified as the depth to be dredged; that he was to take out the mud and the broken stone; that he found the bottom rocky and in many places the bucket jumped and slipped over something too large to be raised in that way; that he could not tell if it was a natural rock or boulder; that he complained to Smith, Jr., that the work was not what he understood when he made the bargain; that he brought up some pretty large stones—one 2 or 3 feet thick and roundish; that he appealed to Smith, Jr., for an increase of pay on account of these difficulties, but Smith refused (*Somers*, pp. 240–252). It seems incredible under these circumstances that Smith believed that there was a uniform depth of 14 to 15 feet, as he states he understood from the dredger.

Upon the whole evidence bearing on this point, the conclusion of the Court of Appeals, as stated in his opinion, by Chief Justice Alvey, is well sustained as follows (p. 698): "But it would be difficult to conclude, upon the evidence in this record, that the appellants did not have knowledge of the existence of the rock and of its dangerous nature. They had been for some years in the use of the wharf and of this particular berth; and it appears that not a great while before the occurrence of the accident in ques-

tion, a vessel, while being loaded with stone from the same wharf, and occupying a berth in front of it, struck upon a rock and was injured, and this fact was brought distinctly to the knowledge of the appellants."

VI.—The master was not guilty of negligence which contributed to the injury.

1. The first specification of negligence in the answer (p. 18, fol. 29) is in not ascertaining the condition of the bottom of said berth or dock.

Assuming that there was an obligation on the master to take any precaution of this kind on entering a dock at the request or upon the business of an owner of the wharf, the master in this case did far more than could reasonably be required of him. As before stated, the contract or charter for the taking on board of this cargo was made, not with the appellants themselves personally, but with Lee. He was a ship chandler, having a store looking out upon this wharf and dock, and had been in the habit, long before the *Tobin* came, of engaging vessels for the appellants for this business (*Lee*, p. 80, fol. 127; p. 82, fol. 130). The captain testifies that on Tuesday, he having had some previous conversations with Lee, went to Georgetown and told him he would take the stone (p. 45, fol. 69). He testified:

"I asked him how much water there was, and if "there was enough to load us through, and he asked "me how much I drew. I told him that with 570 "to 575 tons of coal, our usual load, we drew from "14 feet to 14 feet 3 inches, and with stone I should "put in 600 tons and draw 14½ feet. He told me "there was plenty of water. He said: 'You can load "with 15 feet.'" "He said: 'Mr. Smith had had "it dug out this last spring to make 14 or 15 feet at "low water.' He said: 'You can load there at 14 "feet with low water.'"

Objection was made to the declarations of Mr. Lee, on the ground that he had no authority to bind the appellants, but on the question of the diligence of the master in respect to this particular point, the evidence was certainly competent and important as showing the master's diligence. It is true that Smith, in his testimony, has denied any authority for Mr. Lee to act for him, but it is equally true that for many months, if not for years, Mr. Lee had engaged vessels which loaded at the pier, and the arrangements made by him for such freighting business, including the amount of freight per ton, had been acted upon and ratified by the appellants. Indeed, in this particular case the vessel began to load before the master saw Mr. Smith, and when he did see him Lee introduced him as the gentleman the master was loading for (p. 46, fol. 72).

Wholly aside from the particular relation between Smith and Lee, Lee was a proper person of whom to make inquiries. From his being engaged in this business of procuring or furnishing vessels for the loading of stone at the wharf he was naturally the person of whom the master would make inquiries.

Having moored his vessel first above Smith's wharf, he went round and saw Mr. Speaker, foreman of Mr. Smith's works, on the dock (p. 46, fol. 70).

Here again the objection is made that Mr. Speaker had no authority to bind Smith by his declarations with regard to the condition of the dock. This position is clearly untenable, because Speaker was the representative of Smith, placed by him in charge of the dock, and unless he represented Smith, then Smith had nobody there to transact business for him. Smith very disingenuously seeks to limit his authority to that of a mere engineer, but in the statement introduced by him, made almost contemporaneously with this disaster, he calls him the foreman of the crusher (p. 467, fol. 844). There would seem to be no doubt of his being put in such a position in charge of his

business that his declarations were the declarations of Smith. At any rate, on the question of the diligence of the master he was the proper person, Smith not being there, for the master to make inquiry of. And the master testifies: "When Mr. "Speaker came I told Mr. Speaker we would haul "her so that the chute would hit the hatch as we "wanted her. We did not lay in the right position "for the hatch under the chute. We hauled her "until he said she was right" (p. 46, fol. 71).

There was but one place for the vessel to lie, that was so that the chute would deliver the stone into the hatch of the vessel. The arrangement of the crusher was made for this very purpose.

There is a photograph (next following p. 114) showing how the chute was arranged. It was a permanent chute or channel attached to the crusher, coming out 25 feet from the edge of the wharf, so that a vessel lying outside of a barge could receive the stone into her hatch. To the foot of this permanent part of the chute, which extended 25 feet out, that is, beyond the width of the barge, a movable iron chute was attached, one end to the lower end of the permanent chute, and the other end going into the hatch. There was, therefore, little or no room for choice of position or movement of the vessel while receiving her cargo, except that she was hauled backwards and forwards to accommodate the chute to the forward or the after hatch, and her bow and stern could be slightly moved in or out.

This photograph (Exhibit No. 8) shows the edge of the wharf, the chute coming from the crusher, the intervening barge, and a vessel lying outside in position to receive her cargo. It appears by other evidence that the hatch over which the chute was first placed was the after hatch, and she continued to receive stone there till sometime Friday between 2 and 3 o'clock. The master then continues:

"I then asked him (Speaker) how much water "there was there. He said it had been dredged

" out to between 14 and 15 feet this spring, and he " showed me piling there. He said, 'We didn't " dredge below that piling.' It was the fourth " piling from the stone crusher down the river, but " he told me the water was deeper below there, so " that it didn't need digging out, and there was " water enough, just so we breasted our stern off so " that the bilge would not touch where the lighters " were unloading stone. He said there might have " been some small stone falling off the lighters. He " didn't know there had been any, but there might " be some dropped off " (p. 46, fol. 71).

As to the position of the vessel being determined by the appellants, it is admitted by Mr. Speaker, who says:

" Q. What, if any, directions did you give to the " captain as to where to go or what he could do " with the schooner on her arrival?

" A. I told him where to take his berth and asked " him which hatch he wanted us to commence dis- " charging stone into, and he told me, and then I " showed him what position to put the vessel in so " that the chute would discharge into the hatch that " he designated " (p. 334, fol. 594).

Mr. Speaker denied having any conversation with the captain at that time or before Friday afternoon, with regard to the depth of water, but Twiford, the mate, corroborates the captain. He says that he heard the conversation between the captain and a gentleman on the wharf. He asked the gentleman how much water there was there and he told him there was 15 feet of water. He didn't know the person at the time, but afterwards he knew him as Mr. Speaker, the superintendent of the wharf (p. 138, fol. 232). He was also corroborated by one Godfrey, an assistant engineer and employee of the Smiths, who helped to moor the vessel. He testified:

" Q. Did you hear any conversation take place at " that time between the foreman of the wharf, Mr. " Speaker, and any one?

" A. I heard the captain asking about the water.

" Q. What did he ask him?

" A. He asked him how much water was there, " and he said ' plenty of water.' Then he asked " him what did he call ' plenty.'

" Q. What did he say then?

" A. He said 15 feet."

" Q. Did you hear Mr. Speaker ask the captain " anything?

" A. No more than ask what the vessel drew.

" Q. What did he say?

" A. 14 feet " (p. 119, fols. 197, 198).

Against all this testimony in confirmation of the captain's account, the denial of Mr. Speaker should properly be and probably was by the Court below, attributed to a failure of memory.

The captain then testifies:

" We had a pole to breast her off with " from the dock, so the vessel could not sag in on " the lighter, so they could work the lighter to hoist " the stone up on the crusher and crush it and let it " come down the chute on board the vessel. After " we got the pole in place I took the lead and threw " it over aft, over the quarter, I didn't find less than " 13 feet up to the mizzen rigging, and after we got " to the mizzen rigging and abreast of where Mr. " Speaker stood, it dropped off to about 16 feet. " They went to work as soon as they got ready " Thursday morning after we got in place dump- " ing stone in the aft-hatch " (p. 46, fol. 71).

If the captain had done nothing more and nothing more had been said to him on the subject of the depth of water, this would have been abundant diligence on his part, but the next day, Friday, in the forenoon, he called at Mr. Lee's office and saw Mr. Lee and Mr. Smith, Junior, and there he was first introduced by Mr. Lee to Mr. Smith as the person

he was loading for, and the captain testifies that after some conversation about the length of time it would take to load, "I asked him how much water " he had there. He said that he had had it dredged " out this spring, in April, and that they were to " make 14 or 15 feet and there were 14 feet sure at " low water" (p. 46, fol. 72).

He testified that Mr. Smith told him he would like him to make some soundings for himself. He said there might have something dropped over from the lighter he didn't know of, but would like him to sound (p. 47, fol. 72).

On cross-examination, referring to this conversation with Mr. Smith, the captain testified:

" Q. Then what did you say?

" A. I asked him how much water there was at " the dock.

" Q. You had been lying then for nearly two " days there?

" A. One and a-half nearly.

" Q. And he told you he would like you to sound " for yourself?

" A. He said he would like me to make some " soundings for myself.

" Q. That was what time of the day?

" A. I think it was a little before noon. I should " judge about 11 o'clock.

" Q. What did you say in reply to that advice of " his?

" A. I told him I would.

" Q. And did you do it?

" A. I did.

" Q. Immediately?

" A. No, sir, not immediately.

" Q. When?

" A. I did that afternoon" (pp. 64, 65, fol. 101).

Later the witness makes a fuller statement of this conversation as follows:

" After I had an introduction to Mr. Smith and " he told me how much water there was—that there

" was 14 feet sure at low water—he told me " he would like me to make some soundings " around for myself, and he said he would " have his men help my men shove off with a pole " that he had on the lighter whenever we wanted " to shove off, and he wanted me to sound " on the inside, as some stone might have " gotten off the lighter, and if we shoved her bilge " off—her side he called it—so we didn't hit the " stones, there was nothing to hurt us, and when he " came on the dock that afternoon he told me the " same thing " (p, 77, fol. 122).

Mr. Smith's account of this conversation was as follows:

" Mr. Lee introduced me to the captain, and said " to the captain that I was the party who was load- " ing the vessel. The captain made some remark " as to when we would be apt to finish the loading, " and I think I said on Monday or Tuesday; that we " loaded in the neighborhood of 125 to 150 tons a day. " There was some other little conversation as to his " wanting to get away as soon as he could, and I told " him that we wanted him to get away as soon as " we could load him. He then asked something as " to the amount of depth of water in front of the " wharf. I think he asked what the depth of water " was in front of the wharf. Mr. Lee answered the " question; I don't know whether the captain asked " me or asked Mr. Lee, but Mr. Lee answered him " by saying that it had been dredged out in the " spring to the supposed depth of 14 feet. The cap- " tain had some conversation with Mr. Lee, I think " as to about what water he drew, and he also said " that it would not hurt him to lay on the bottom " if the bottom was in decent shape. I told him I " did not know just what the bottom was, but that " I would advise him to make his soundings there " and to find out from time to time just how his " vessel was laying, and that I would see that he " had any assistance he wished in moving the ves-

(*a.*) This expression, that he did not know just what the bottom was, is denied by the Master (fol. 917), and not confirmed by Lee (fols. 129, 139). According to the sworn answer, if used, it was coupled with the expression "although they thought it was all right" (fol. 27), and in the statement made by Smith it was coupled with the same expression, and with the advice to sound *around* the vessel (fol. 844).

" sel forward or aft or shoving her out; that we " would do just what he wanted done, and that " after he made his soundings he could tell me what " he wanted done. I told him that we had loaded " vessels as large as his vessel and mentioned one " or two that were larger where I had told the cap- " tain, as it has been my invariable custom to do, to " make their soundings as they loaded. I referred " especially to the *Sunlight*, and stated that we had " loaded her, and I believed that she was a larger " vessel than the *Tobin*; that we had put in the last " hundred tons or so by putting in two scows, and " wheeling on board across the scows—wheeling " from the bins with wheelbarrows. I told him we " would do that or anything else that he wanted if " he would indicate what he wanted. That is about " the extent I think of our conversation.

" Q. What, if any, reply did he make?

" A. He said that he would sound. He assented and seemed to understand " (p. 293, fols. 515–517).

In the answer sworn to by Mr. Charles G. Smith, Junior, there is some recital of this conversation, as follows:

" On Friday, the 4th day of August, 1893, the " said schooner being then partly loaded, one of " these respondents, Charles G. Smith, Junior, said " to the said master that it would be wise " for him to sound around his vessel and make sure " that she was lying all right; that it was usual for " captains to look out for their own vessels and " their position at the wharf, and that although the " said berth or dock had been dredged out in the " early part of that year the respondents did not " know just what the bottom was, although they " thought it was all right; that he would advise " the master to sound and satisfy himself as to " the depth of water and that respondents would " give directions to their men to carry out any in- " structions the said master might give as to loading, " &c., and that they would aid the said master in

" shifting the position of said schooner if he consid-
" ered any change necessary " (pp. 17, 18, fol. 27). And in the statement made by Smith to his counsel immediately after the wrecking of the *Tobin*, he says:

" On Friday, when the *Tobin* was partly loaded,
" I had conversation with the captain in Lee's
" store, and in the presence of Joseph H. Lee, who
" heard the conversation. In this interview I stated
" to the captain that it would be wise to sound
" around his vessel and make sure that she was
" laying all right. The captain said it would not
" hurt to lay on the bottom slightly and referred
" to the *Sunlight*, a larger vessel than his, having
" loaded there last year. I said in reply to this that
" it was usual for the captains to look out for their
" vessels and that while the dock had been dredged
" out since the vessel *Sunlight* had loaded, at the
" same time I did not know just what the bottom
" was, but thought it all right, but would advise
" him to sound and I would tell the foreman to
" carry out any instructions that he, the captain,
" might give as to loading or not loading, and that
" he would, if necessary, help him shift. I also
" stated that we finished loading the *Sunlight* with
" wheelbarrows instead of running direct from the
" chute " (p. 467, fol. 844).

From this averment in the answer and also in this statement made after the disaster, it seems entirely certain that what Mr. Smith advised the captain to do was to sound *around* the vessel as she lay at that time, to Smith's knowledge, receiving her cargo. That was the only precaution which Smith advised him to take.

Mr. Lee's account is as follows:

" Then, on August 3d, the captain was in my
" office, and Mr. Smith came in there and I intro-
" duced him to Mr. Smith. I said, 'Captain, this is
" your shipper and you will have to make your

"complaints to him.' The captain said, 'How "about the water there?' Well, I presume I ought "to have allowed Mr. Smith to answer the ques- "tion, but I answered it for him, and I said, 'The "dock had been dredged out, supposed to be 14 "feet, though you might touch at low water.' Mr. "Smith said to him, 'I want you to make some "soundings for yourself, and our superintendent "will help you to place the vessel'" (p. 81, fol. 129).

He also testified that before this introduction, when he saw the captain before that day the captain asked about the depth of the water (p. 82, fol. 131; p. 83, fol. 132).

Lee understood that the *Tobin* was a 14-foot vessel--drawing about 14 feet (p. 84, fol. 133).

Lee restates the conversation as follows:

"I introduced Captain Hankins to Mr. Smith. "* * * I said to the captain: 'This is your "shipper.'

"(Q. Had the captain asked any questions just "before that? A. No, sir—) 'To him you will make "your complaints'. The captain replied, 'I don't "think I will have any to make'. He then asked "as to the water.

"Q. The captain did?

"A. Yes, and I replied, 'The dock had recently "been dredged out, supposed to 14 feet at low water, "though your vessel might ground at low tide.'

"Q. Did you then say, 'But nothing to hurt.'

"A. I don't remember that. Then Mr. Smith "and Captain Hankins had a conversation, but I "paid no attention to it" (pp. 87, 88, fol. 139).

It is quite clear from these conversations, even as stated by Mr. Lee and Mr. Smith, that they were intended to give the captain the impression that the only precaution he need take was to sound *around* his vessel. Nothing was said about any obstruction or rock in the berth itself, or under the vessel. The

conversations as stated by Smith and Lee would not lead any one to suppose that any other precaution was necessary. It amounted to a statement that that berth where the vessel lay had been dredged out to 14 feet, or about that.

The captain, that afternoon, following the advice given him by Mr. Smith, made careful soundings around the vessel. He took the precaution to mention to the mate what Mr. Smith had told him about the water and about the soundings, and instructed him if he hauled—that is hauled his vessel—so as to load at the forward hatch while he, the captain, was absent, to be sure to sound and find the depth of water. He testified that he went up to Mr. Lee's store after dinner and came down about 3 'oclock. The mate had just hauled her—just got her fast. He asked the mate if he had sounded, and he told him he had and that he found 13 feet of water. The captain then testified:

" I took the lead line and marked it off and went
" on board. I marked it off in feet and tied rope
" yarn around the lead line, measured with my rule
" one foot apart, and then took the lead and
" sounded for myself. I commenced aft and
" sounded up to the mizzen rigging. The least I
" found was 13 feet and 2 or 3 inches, and after
" I got by the mizzen, that piling where Mr. Speaker
" told me it was dug out to, it deepened off to 16
" or 17 feet. I did not measure exactly, because
" there was plenty of water. The mark went down.
" That was Friday afternoon " (p. 47, fols. 72, 73.)

At the time of these soundings the vessel was of course by the stern. Up to 2 o'clock they had been loading in the after hatch, and at the time of these soundings they had just commenced loading into the forward hatch. The fact that the master didn't sound forward of the piling referred to as the fourth piling, where he found 16 feet of water, is to be taken in connection with the statement which had been made to him by Speaker when the vessel was

(*a.*) Counsel for appellants argue that if the master's report of soundings on Friday afternoon be reduced by an allowance for the height of the tide at that time above low water, the master ascertained that there were less than 14 feet in the berth, at one point 11½ feet only, and at other points 12 or 12½ feet at low tide, and therefore the master then discovered that the supposed representation of 14 feet was not true, and that the vessel was liable to touch at low tide and the master voluntarily took the risk (Fifth Point, pp. 38 to 40).

It nowhere appears that the soundings given were not low water soundings. They are substantially the same as Saturday's soundings which certainly were so. Nothing to the contrary appears in the captain's testimony, nor was he cross-examined on that point. Where he found shoal water was where Mr. Smith and Mr. Speaker had both told him the water might be shoal in consequence of stones falling off the scows, outside of the after part of the vessel toward the wharf. This would not affect in any way the safety of the vessel, because from the shape of the hull and bottom the vessel could not touch at that point. Even, therefore, if a correction were made for the tide, there was, as the captain said, plenty of water, or water enough. But Speaker reports deeper water than the Captain (fol. 608). These given by Speaker may be the depths actually found. He says that the Captain said it was all right (fol. 596). The condition of the wreck after she sunk on this rock and in

this berth shows that the master was right in his conclusion that there was water enough, and more than enough where he sounded, and everywhere, except at the centre of the berth, where this rock was, for lying in the same place she was pushed up amidships some 3 feet, yet both the stern and the bow were sunk in their places to the bottom, bringing the draft marks of 13½ feet forward and 14½ feet aft under water, with the water coming up on the upper deck at high water (Kensel, fol. 218; Hankins, fol. 96). The soundings of Friday, therefore, did not give the master any notice whatever that the vessel was in danger of touching at low water. And if Speaker and Smith are right that putting on the last of the cargo by wheelbarrows had been already talked about, the vessel needed not fourteen but about twelve feet.

This argument is an entire shifting of the issue, and inconsistent with the answer. The charge of negligence is that the master *did not ascertain* the condition of the bottom of the berth or dock. By an afterthought, apparently suggested by a slight obscurity in the testimony as to the soundings on Friday, they now urge, *upon the appeal*, that the captain *did ascertain* the danger and voluntarily encountered it. (See also 5th Error assigned, Appellants' Brief, p. 28).

The real and only danger was the rock in the centre of the berth. This certainly was not discovered or suggested by Friday's soundings.

first placed in the berth, and which is not denied by Speaker as a witness. He had then told the captain that from that piling down they had not dredged, and that the water was deeper there and needed no dredging. There was water enough (p. 46, fol. 71). Speaker and the mate confirm the captain's testimony as to his soundings on Friday afternoon (*Speaker*, p. 335, fol. 596; p. 341, fol. 607, 608; pp. 376, 377; *Twiford*, pp. 140, 141.) (a)

The subsequent soundings made by the captain on Saturday, after he thought the vessel touched, confirms this statement of Speaker, which indeed was repeated to the captain on Saturday afternoon by him (p. 47, fol. 73).

These soundings on Saturday were all around the vessel.

He didn't find less than 12 feet anywhere on the inside nor less than 14½ feet on the off-shore side, and right over the stern there were 13½ feet of water (p. 48, fol. 74).

The shallowest sounding was taken from the lighter, six feet at least inside of the schooner (p. 513).

At half-past 2 on Friday—that was soon after they commenced with the forward hatch—she drew 13 feet aft and 8½ forward (p. 60, fol. 94).

The longer they worked the forward hatch the more, of course, she came up at the stern.

These soundings on Saturday were at about dead low water, after quitting work (p. 62, fol. 97).

Therefore, even assuming that Smith and Lee are more correct in their statement of the conversation with the captain on Friday morning than the master, he did all that he was advised or warned to do, and upon their own statements they said nothing to him about the bottom being a rock bottom; they said nothing to him about the case of the *Baird*, except that she touched at a very low tide, although it was known to them that she got on some obstruction in this berth, resting on her keel about amidships, as on a pivot; they said nothing about the

rock which Smith, in his statement made to his counsel, admitted was there, and which he knew was there from the way the *Baird* acted; they said nothing about sounding otherwise than *around* the vessel. There was nothing in what they said to lead the captain to suppose that there was any danger provided he found water enough *around* the vessel. Neither he nor the vessel had ever been in Georgetown before (p. 79, fol. 124).

There was, therefore, an entire failure to prove any want of diligence in this respect on the part of the master. But that the defendants were themselves aware that there was a danger in the middle of the berth is distinctly admitted in the cross-libel, for they say:

"While said schooner was lying at said wharf and "while taking on said cargo," &c., "said schooner "began to leak, and in consequence of the negli- "gence, carelessness and want of skill on the part "of said master in not removing the water there- "from and in not placing the said schooner in a "place of safety, and by reason of the negligence of "the said master in failing to take proper measures "to ascertain the condition of the bottom of said "berth or dock at said wharf, and *to avoid the dan- "ger of injury that the said master would have dis- "covered if he had made proper soundings and "examination of the said berth and dock, and the "bottom thereof*, the said schooner on the 6th day "of August, 1893, sank at said wharf at her said "berth and in said dock" (p. 21, fol. 32). The italics are ours.

It is true that this specification contains an averment that the vessel had begun to leak at the time the master was negligent in not ascertaining the condition of the bottom of the berth or dock, but that averment has been distinctly disproved, and here is a statement in the cross-libel, sworn to by Charles G. Smith, Junior, on December 26, 1893, that if the master had taken proper measures to

ascertain the condition of the bottom of the dock, if he had made proper soundings and examination of said berth, he would have discovered the danger of injury. The only danger of injury which has been shown was the existence of this rock in the middle of the berth under the vessel.

The appellants, as shown by this averment in their cross-libel, knew of the danger, at any rate, December 26, 1893, and they say that the master would have discovered it if he had sounded under the vessel, but they did not advise him to do that. They have not shown that they themselves made any discovery of this danger between the 2d of August and the 26th of December.

2. The next specification of negligence is that the master did not shove said schooner further away from said wharf into deeper water when advised to do so, and did not place an additional scow between said schooner and the wharf, as urged to do, said scow being provided for that purpose by the respondents (p. 18, fol. 29).

This specification assumes that the master was advised to shove the schooner out and failed to do so and was urged to put another scow between the schooner and the wharf and failed to do so.

The evidence does not sustain the claim on the part of the appellants that he neglected any such advice or disregarded any such urging. The reference here is to the transactions at the close of the day on Saturday which have been already referred to. There is a conflict in the evidence as to what took place between the master and Mr. Speaker, the appellants' foreman.

The statement of the master is that on Saturday about 3 or 4 o'clock she was breasted off a little aft with the consent of Mr. Speaker in order that they could get ready to clear the decks off when they knocked off work; that at about 5 o'clock he noticed that the schooner was tipping to the head, and that he asked Mr. Speaker if she was not on

something. He, the captain, thought she was tipping too much, but Speaker said, No, that she was on nothing. He said, "Forward of the pil- "ing, that fourth piling, where it had been dug- "out, you would not touch her if you are full "loaded on the lowest tides, just so you breast "her off aft. So she don't come in aft there is "nothing to hurt you. He said to me that he was "going to knock off at 5 o'clock, that being Satur- "day, and she would not tip much more anyway, "and Monday morning he would put another lighter "inside of us. I asked him how he was going to "get the stone on board aft after he put the lighter "inside, and I said, 'You had better knock off work "now if you are going to put a lighter in Monday "morning and not put any more stone in.' He said, "'We are only going to work a few minutes now. "It is nearly 5 o'clock. Monday morning we will "put the lighter in.' He says, 'You are lying all "right,' and I did not sound again till after they "knocked off work. He worked until 15 min- "utes after 5 and quit. After he had quit he told "me that he would be down there Monday morn- "ing to put another lighter before he commenced "work again. After the men had gone up to get "their pay, up to the office, it came to my mind if "we waited till Monday morning I would lose "something in hauling, and if he would take the "chute out that was in our hatch I would put the "lighter in between that time and Monday morn- "ing and not lose any time." Referring to the iron chute, "It was impossible for me to haul with "that in there, and I wanted him to take that out. "He said he would get some of the men to take "that out. After they got their pay there was two "or three men came down there and took the chute "off and lowered it on our deck." The captain then made soundings (pp. 47, 48, fols. 73, 74).

Mr. Speaker's account of this affair was as follows:

He says they resumed work Saturday morning and kept it up during the day.

"Q. During the day, what, if any, conversation "did you have with the captain about moving the "vessel out and as to her position there?

"A. During the day we talked of moving her out "and we talked about finishing the work by wheel- "barrows. We were talking about getting along "so nicely, that we thought we could finish it on "Monday—finish his cargo. Then we talked about "getting another scow in there to lay over Sunday."

There was then some talk about another pole being obtained, as they would need two poles if she was breasted off outside of the second scow (p. 336, fol. 598).

"I stopped loading on Saturday about 15 or 20 "minutes of 5 o'clock" (p. 337, fol. 601).

"Q. State how you came to stop and the con- "versation you had with the captain.

"A. The captain came on to the wharf and I "was out there. I believe he was out on the wharf "when I went out on the wharf. He was standing "at the bow of the vessel—standing forward there "under the hoister. The captain says to me, he "says, 'I believe I am ebbing out a little bit.' It "was then about low tide.

"Q. State right there what you mean by 'ebbing "out.'

"A. I don't know what he meant by ebbing out, "that we were discharging stone in there and that "he was not going down any more. I suppose "that is what he meant by ebbing out. I told him "that if that was the case we would stop work. "He said that he didn't want to get her down by "the head because he was making a little water, "and he didn't want to get away from the pumps. "He said that if we continued on he believed she "was ebbing out, that if we continued to discharge "stone in there he would get her too far by the head "and she would make a little water and he didn't "want to get her away from the pump. I told him "in that case I would stop the machine and not put

"any more in, which I did. I gave the signal for "them to stop the machine and the machine "stopped. After the machine stopped, it being "Saturday night, the men all took out for their "money, and so, after the men got away he and I "were standing on the wharf alone, and he says to "me, 'What am I going to do about this iron chute "up here?' He says, 'I want to haul on high water "and you haven't told me what scow I shall use.' I "pointed to him and I says: 'Here is the scow lying "right ahead there. Take that scow lying right "ahead of you. That is the most convenient.' He "said he wanted to haul on high water, and I told "him to use that scow. So I went out then, and to "have it all straight I called some of the men—a "number of them—back to take the iron chute "down, and they laid it on the schooner.

"Q. Who were the men who helped to take the "chute down and put it on the schooner? A. I "don't know. There were some. I think, if I ain't "mistaken, there were five or six of them there, "but I don't know just who they were" (p. 338, fol. 602).

Then, after some reference to the conversation about the pole that had been brought down, he testified:

"Q. Did he say what use he was going to make "of the pole? A. No, sir; only what he and I "talked together about using two poles the day "before; that on Monday after we had taken the "second scow out we would use the pole, and then "let her come in as close as would admit the chute "to discharge into the vessel.

"Q. State what was said about the reason for "putting in another scow?

"A. He thought that he could not get a full cargo "there, and I wanted him to make his soundings, "although he said he found plenty of water every "sounding he made there. He said there was

" plenty of water. Saturday evening, though, " when he said he was ebbing out, he thought he " was caught on to something (p. 339, fol. 604). * *

"Q. What time was it when you left the wharf " on Saturday afternoon?

"A. I wouldn't say positively the time, but it was " about half-past five or six (p. 340, fol. 605).

"Q. At that time, this scow of which you speak " was just in front of the vessel?

"A. Yes, sir" (p. 340, fol. 606).

He then says that he next saw her at the wharf between 9 and 10 Sunday morning, and that the same scow was in the same place, right forward (p. 340, fol. 607).

"Q. On Saturday afternoon did the captain ask " you if she was not on something, and did you say " that she was on nothing?

"A. No, sir. I never made any such answer as " that. On Saturday afternoon —— I don't think " the captain and I had any conversation at all until " the evening.

"Q. Did you say to the captain, 'You won't " touch here if you are fully loaded on the lowest " tide just so you breast her off. If she don't come " in aft there is nothing to hurt you'?

"A. No, sir.

"Q. Did you tell the captain on Saturday after- " noon, between five and half-past five o'clock, after " you had quit work, that you would be down there " on Monday morning to put in another lighter " before you commenced work again?

"A. No, sir.

"Q. Did you tell him anything of that kind?

"A. No, sir. I told him on Saturday when " we talked, and I left with the understand- " ing – when I took the chute down for him " and designated the scow which he could use— " I left with the understanding that he was " going to haul on high water and on the first high " water. He didn't say the first high water, but he

" said that he wanted to shift on high water. That " is the way he expressed it.

" Q. He said that he wanted to shift on high " water?

" A. That is the way he expressed it exactly, sir. " I took the chute down for him and told him which " scow to use.

" Q. Did you tell him in anyway or give him in " anyway to understand that you were going to " shift it on Monday morning?

" A. No, sir; I did not.

" Q. Did you give him to understand that you " considered this vessel safe there and it was not " necessary to move her until Monday morning?

" A. No, sir; I did not. If I had done that I " would not have made preparations to get the pole " and scow, and preparations for to put another " scow in there" (pp. 341, 342, fols. 608, 609).

Mr. Speaker, in denying the conversation with the captain about the water on Thursday, says:

" The only conversation the captain and I had " with regard to the water was that he asked me " about the water, and I told him we never had " any trouble except with one vessel; that we had " one to catch on us there, but we had extremely low " water and a northwest wind. I told him that we " had had it dredged out and the man that dredged " it reported 14 or 15 feet of water. He said, 'I " don't draw that much water when I am loaded.' " I said that is the report he gave Mr. Smith; that " he took out between 200 and 300 yards of stuff " and he reported 14 or 15 feet of water. That is " the only conversation ever I had with the cap- " tain.

" Q. The only one?

" A. That is the only one in regard to water. I " think that was on Friday; probably it might have " been on Thursday. * *

" Q. What advice or suggestion did you make to " the captain about sounding for himself?

" A. I told him to make his soundings—probably " that might have been the time when we were " talking about that depth of water.

" Q. What did he say?

" A. He didn't say anything. He and the mate " went to sounding and the mate did the sounding. " The captain was present there " (p. 344, fol. 613).

The real question is, was the master wanting in due care for the safety of his vessel in not moving her out on the high tide of Saturday night—considering all that he is shown to have known concerning her condition and the condition of the bottom and of any danger to her then existing - and did he fail to do this in spite of being advised and urged to do it by the appellants or their foreman?

The questions on which there is great conflict as to what the conversations were between the master and speaker, the foreman, on Saturday, are only important as bearing on the actual existing state of affairs and on the master's knowledge of it

What, then, was the condition when the appellants' men knocked off work Saturday at about 5 o'clock?

Shortly before 5 o'clock the master noticed that the vessel was about eighteen inches to two feet by the head, drawing 12.10 forward and about 10.10 aft (p. 47, fol. 73: p. 49, fol. 75). Between 3 and 4 o'clock he had breasted her off about two feet further than she was before and sounded and found no less than thirteen and a half feet anywhere around her (p. 47, fol. 73).

They had been loading since early Thursday morning, into the after hatch till 2 o'clock Friday, and from that time, after hauling the vessel, say from 2.30 or 3 o'clock, till Saturday at 5 o'clock, into the forward hatch.

The regular time of beginning the day's work was 7 A. M. They stopped for dinner from 12 to 1, and working ten hours a day, the regular time for

knocking off was 6 P. M.—earlier on Saturday—about 5 o'clock (*Twiford*, p. 139, fol. 235; *Smith*, p. 311, fol. 550).

It is generally agreed that they took on board in the three days about 400 tons. This is what Mr. Speaker told the captain.

If this had been delivered along at a uniform rate there would have been delivered into the after hatch during 16 hours about 225 tons, and into the forward hatch during 12½ hours only about 175 tons.

The stone was not weighed as passed into the vessel. The only mode the appellants had of measuring the quantity was that an account was kept somewhere of the weight of stone delivered on each scow or barge to the hoister, by which it passed into the crusher. Of this the master knew nothing and it does not appear that it was consulted by Speaker. As between the appellants and the vessel the return of the Government officers at Fortress Monroe was always accepted as final (*Speaker*, pp. 367, 368; *Smith*, p. 296, fol. 522).

Therefore there was no motive for any one during the loading to inquire or observe even approximately how much the vessel was receiving, and Speaker admits that he could not tell the amount with any precision (p. 367, fol. 657).

Mr. Speaker, however, has in his testimony given important evidence as to the actual rate of delivery and the proportions for the three days. The chute did not work well the first day, because the slope of the iron chute to the hatch was not steep enough, the vessel being light and high in the water. His rough estimate is 100 tons Thursday, 200 tons Friday and less than 100 tons Saturday (*Speaker*, pp. 367, 368, fols. 657, 658, 659).

(*a.*) As it appears from the testimony that the last part of the cargo was to be put on board by wheelbarrows after the vessel was moved out (fols. 600, 604, 645, 667), it is grossly improbable that 300 tons were put into the after hatch. The very object of having a part of the cargo of a deep draft vessel put on by wheelbarrows was that she should be moved out before she was in danger of touching the bottom. The appellants were in the habit of doing this although it cost them twenty cents a ton more (Smith, fols. 517, 552). 400 tons was the amount she was to take on where she lay, and the obvious policy both of the foreman and the master would be to distribute this with substantial equality between the two hatches. Speaker's statement, which, to be sure, is an estimate only, that 300 tons was deposited in the after-hatch, is, like many of his statements to which attention is called in this brief, a misstatement and misleading statement, inconsistent with other proved facts, and recklessly or carelessly made in the interest of his employers. Moreover, Speaker contradicts himself on this very subject. At folio 677, he says or implies that all of the 200 tons put on board on Friday were put into the after-hatch, whereas elsewhere he estimates the whole amount delivered on Friday to be only 200 tons, and certainly from half-past two or three o'clock until the close of the day, six o'clock, they were loading into the forward hatch, and all that was put on board on Saturday, which he estimated at about 100 tons, also went into the forward hatch (fols. 657, 658 and 659).

This shows that there was no such inequality in the proportionate deliveries. (a)

But the master having the impression, perhaps from the greater length of time that the deliveries in the after hatch exceeded those in the forward hatch, found a little before 5 o'clock, that the vessel was by the head more than he could account for by what he knew as to the cargo (p. 62, fol. 97). Smith had told him they could load about 150 tons a day (p. 46, fol. 72). The captain could not tell how much stone went in (p. 66, fol. 104).

He says that he told Speaker he thought he was aground or touching (do., do., p. 67, fol. 105). p. 47, fol. 73)

Speaker denies this, but admits that he said he believed he was "ebbing out" (p. 338, fol. 601).

Which expression he understood to imply that he was aground (p. 374, fol. 671; p. 339, fol. 604).

According to both it was merely a suspicion on the part of the Captain

Another witness says that the captain used the expression "ebbing out."

There is no definition of this expression, but it may be taken to mean that as the tide ebbed the vessel was left out of the water. It is somewhat similar to the expression used by Captain Cole, of the *Baird*—that he found his vessel was out of the water as the tide fell (*Cole*, p. 279, fol. 490).

However, the mode of expressing it is of no consequence. The material thing is that the master attributed the vessel being by the head to her touching the ground, and that he communicated this idea, this apprehension, to Mr. Speaker, and they both agreed that they had better not continue, lying where she was, to load her by the forward hatch.

The captain says, however, that when he told Speaker what he thought, Speaker disagreed with it, and said she was all right (p. 47, fol. 73). (b) If this

(b) Speaker also told Godfrey, Appellants' employee, on Saturday, at the close of work, that the vessel lay all right, in answer to his question if he was going to shove her out, (fol. 99). And Speaker was the foreman and generally directed where wheelbarrows should be used (Taylor, p. 439, fol. 793).

was so, Speaker must have attributed her being by the head to the way the cargo had gone in, and he knew more about this than anybody else. (a)

Speaker denies this, though he admits that the captain called his attention to her being down by the head (p. 374, fol. 669), and on the stand he doubted whether she was by the head (do., do.). His subsequent conduct, however, shows that the master is right in this, and that Speaker may have forgotten it. Speaker said at any rate that they would knock off in a few minutes, and they did so.

Shortly afterwards, after six o'clock, the master took careful soundings all around the vessel and these reassured him and convinced him that she was afloat (pp. 62, 63, fol. 98).

They also had talk that day about putting in another scow and continuing the loading by wheelbarrows (*Hankins*, p. 48, fol. 74; *Speaker*, p. 336, fol. 598).

This, of course, implied the removal of the iron part of the chute, for it could not remain in the hatch while they were moving the schooner out (*Speaker*, p. 339, fols. 603, 604).

And it is certain that Speaker let all his men go, not to return till Monday morning.

It is also certain that the master, after the men had left work, of his own suggestion, asked Speaker to call them back to take down the iron chute. Both agree on this.

It is quite certain that the master's purpose in this was that he with his own crew might shove the vessel out before the loading was recommenced Monday morning.

It is also certain that the men came back—5 or 6 of them, Speaker says—and took the chute down (p. 338, fol. 602).

But there is a difference between the master and Mr. Speaker at this point, as to what was said when the men were thus called back and what the master's purpose was.

The master's account is as follows: After the men left, it occurred to him that there would be loss of time Monday morning if the chute had to be taken down on Monday and the vessel shoved out before resuming the loading of the vessel, and therefore he thought he would have the chute taken down then, with the expectation of his moving the vessel out before Monday morning.

Speaker's account is that the master said he wanted to or would shove her off at high tide. He does not pretend that the master said the *next* high tide, which would have been about midnight that Saturday night. Other witnesses testify that the master spoke of shoving her off at high tide, but no witness says that he spoke of the *next* high tide and the language used did not imply that.

As to this, the master says he did not say at high tide, but he may have said *at slack water* (p. 511, fol. 920).

The master undoubtedly would, if he moved her at all, move her at slack water, when he could handle her more easily and more safely.(a) This comes only at high or low tide, and as there was still a possibility, notwithstanding his soundings and the effect of them on his mind, that she might touch at low water sufficiently to make it difficult to move her at low tide, it is almost certain if he carried out his purpose of moving her out before Monday morning, he would do it at high tide.

There would be two high tides before Monday morning—one at midnight Saturday, the other about 1 o'clock on Sunday afternoon.

Questioned about his intentions the master says, that while he didn't generally like to work Sundays

(a) The mate was away and the Captain seems to have had only three men (Endicott, fol. 396; Barclay, fol. 57; Stevens, fol. 465; Thompson, fol. 470).

he thought he would have moved her out Sunday if the weather was good. Otherwise he would have waited till Monday (p. 68, fol. 107).

Apparently to give plausibility to Speaker's theory that the master's intention was to shove the vessel off at the *next high tide*, Speaker says that the master said she was making a little water, and that he didn't want her to get more by the head because the water would get away from the pumps (p. 338, fol. 601).

This is denied by the master (pp. 512, 513, fol. 922).

And both parts of the statement are grossly improbable.

In the first place, the master positively denies having said that she was leaking or was making water (p. 513, fol. 922).

As to the fact that she was not leaking Saturday evening, the master is corroborated by several witnesses (*supra*, p. 14).

The leak by which she was found to be sinking the next morning at 8 o'clock was so serious a leak that the pumps made no headway against it. That she did not leak on Saturday night is also shown by the fact testified to by the master, and which is in no way contradicted or controlled by other testimony, that when he got up in the morning at 6 o'clock she was no deeper in the water than she was the night before. He observed her marks forward, which would clearly have shown him if she was any deeper in the water (p. 61, fol. 96).

If she had sustained the injury by which her seams were opened and a serious leak or any leak from which water would have been found in her the night before, she would have filled before morning. Assuming, as is very likely true, that she did touch the night before, although the captain was satisfied by soundings and by the assurances of

Speaker that she was afloat, then it is quite clear, upon all the evidence, that by grounding at low tide on Saturday she sustained no such injury as made her leak. Like the *Baird* she grounded, but did not that time spring a leak. And it is equally evident that when she touched on Sunday morning, within an hour or two of low water, somewhere between 6 and 8 o'clock, she did sustain an injury by which the seams of her centreboard well were opened and the leak so occasioned was so serious that all efforts to save her were in vain.

It is quite possible, in explanation of the different effect from the grounding on Saturday evening and on Sunday morning, that on Sunday morning she grounded upon the rock in such way as to bring the entire strain upon one side of the centreboard well, or more on one side than was the case the night before. If she floated, as seems probable, at high tide on Saturday night, she might not then come down upon the rock Sunday morning in precisely the same position. Firmly as she was moored by lines and the pole connecting her with the wharf, her position might be slightly shifted while afloat. There is nothing, therefore, improbable in the account given by the master and the other witnesses of the fact that she sustained no injury when aground, as she may have been on Saturday night, and yet sprung a sudden and serious leak by settling down on the rock in nearly the same place on Sunday morning. It is, therefore, improbable that the master told Speaker that she was making water, because the proof is she was not.

And here the master is corroborated both by the contemporaneous memorandum of Chas. G. Smith, Jr., and by his sworn answer. The memorandum says that "Speaker left for the night, with the distinct understanding that the vessel lay all right for the present" (p. 468, fol. 846). And the answer says that "the master said he was lying all right." As Smith was not there he must have got these statements from Speaker, and they are entirely in-

consistent with the vessel's being known to be then leaking, or with Speaker's having any knowledge of facts tending to show that she was in any danger. But for the master's own request he would have left the chute in and she would have remained there till Monday morning.

The other part of Speaker's statement is equally improbable, namely, that the master did not like to have her more by the head, because the water would get away from the pumps. This vessel had three pumps, one at the bow, forward, one amidships and one astern, and the pump forward was calculated to take out all the water that should settle in the forward part of the vessel. It would be a very senseless observation for the captain to make, and he denies that he did make it (p. 513, fol. 922).

Her three pumps were first-class, and when she was rebuilt it was not thought necessary for her to have more than two, and the one amidships was dispensed with (*S. W. Smith*, p. 554, fol. 992).

Speaker also says that the talk about two scows and breasting the vessel out with two poles was not with the idea of continuing the loading on Monday with wheelbarrows, but of leaving her in safety over Sunday, and then taking away the second scow Monday morning and moving her in as far as she could and continuing the loading with the chute until they found they could not do it and then to use wheelbarrows. This is denied by the master (pp. 511, 512, fol. 920).

This mode of loading the vessel, moving her in and out after Monday morning and taking out one of the scows for the purpose of moving her in and out, is not suggested by Mr. Smith. On the contrary, Smith says that what the captain had been told was that they had loaded the last part of the cargo of the *Sunlight* by wheeling the stone over two scows in wheelbarrows, and this is what the captain understood Speaker to suggest was the object of having the second scow there (*Smith*, p.

293, fol. 517; *Speaker*, p. 336, fol. 598; *Hankins*, p. 48, fol. 74).

The proposed method of loading on Monday morning, suggested by Speaker, was actually impracticable. The master has testified that if he had moved the vessel out and put in another scow it would take him an hour (p. 68, fol. 107). It would be very absurd to move her out the width of another scow to lie till Monday morning and then move her in again to receive her cargo by the chute, as Speaker says, "as close as they could." This seems to imply that they should move her part of the way in and then as she was more loaded move her out again.

Such a scheme would be wholly inconsistent with the theory of the appellants, that the object of moving her out was her own safety, for the deeper she got in the water the more dangerous it would be for her to be moved in. Moreover, there would be great waste of time in moving her out, then moving her in, and then moving her out again. And unless she was really moved back where she was before, it would probably be impracticable to continue loading her with the chute, as Mr. Speaker says they had trouble the first day when the vessel was high out of the water in making the chute work, because the inclination was too little; the stone blocked up the passage (p. 378, fol. 678). This difficulty would be encountered the moment they moved her out from the position she then was in, further away from the wharf.

Upon the whole testimony of Smith, Speaker and the master, it seems very improbable that any such method of loading as Speaker suggested might be adopted on Monday was suggested at all. The suggestion seems to have been made to give plausibility to his theory that it was considered necessary for the safety of the vessel only, to shove her out before Monday morning.

Moreover, this suggestion of Speaker is utterly inconsistent both with Smith's memorandum and his answer. Both assert that the object of putting

in another scow was to put in the rest of the cargo by wheelbarrows (Memo., p. 468; fols. 845, 846; Ans., p. 18, fol. 28), and Smith details the method of loading when two scows were used (pp. 309-310, fol. 544).

The real question, then, being whether the circumstances in which the vessel was placed and the information the captain had of her danger were such that it was negligence in the master not *to rouse his crew at midnight that Saturday night* to shove the vessel out instead of waiting till slack water on the next high tide in the afternoon of Sunday to do it, the relative theories of the parties on this question are these: The master's theory is that he was in no known danger on Saturday night, even if she did slightly touch the bottom, and that the removal of the chute was merely to save time so that they could begin work promptly Monday morning, and his intention was and expressed purpose, to shove her out and put in the scow before Monday morning, and even if he referred to high water it did not mean the next high water.

It does not affect the argument if he did say he would shove her out on or at ~~the~~ high tide, unless he meant the next high tide, of which there is no proof whatever.

Mr. Speakers' theory, and that of the appellants, is, that the master was alarmed for her safety and wished to get her out as soon as possible, that is on the next high tide, and that this was his object and declared purpose in having the chute removed.

Upon these two theories we make the following observations:

There was nothing improbable in the master's statement that he was satisfied after making soundings that she was floating. He sounded all around the vessel and found plenty of water for her then lading. The only caution he had received with regard to her position was that which he had received from Mr. Smith, that he had better sound *around*

the vessel. He had no reason to suppose that there was any obstruction *under* the vessel of which he was not informed. His judgment as to the effect of the cargo put on board in making her tip forward was simply a rough estimate of the relative amount of cargo put into the aft and forward hold, probably derived from his recollection of the length of time she had been loading in the two hatches respectively, and the effect which these amounts would have in tipping her; but he had no real knowledge of the cargo put in. It does not appear that he was in the hold at all.

The case might have been quite different if the master knew with certainty that there were 300 tons aft and only 100 tons forward (*S. W. Smith*, p. 559, fol. 1000). But this was not the fact nor did the captain know how much was put aboard.

The trimming of the cargo was attended to by the mate, as Speaker admits (p. 339, fol. 605), although of course, like everything else in regard to the care of the vessel, it was under the master's direction, but it does not appear that he actually took any part in the trimming or that he was below at any time on Saturday, nor has either party seen fit to produce any evidence of the appearance of the cargo in the hold, as evidence of the relative amount forward and aft, although the four or five trimmers employed were appellants' men (*Speaker*, p. 355, fol. 635; p. 367, fol. 657). Speaker was frequently on the vessel to look after them (Britt

In the next place it does not follow because a larger amount of stone may have been put into the after hatch than into the forward hatch, that she might not tip forward. There is a drawing of the deck put in evidence, made to a scale by the witness Brewer (see Exhibit 7, *Brewer*, opposite p. 290).

By that drawing it is seen that the forward hatch was nearer to the bow of the vessel than the after hatch was to the stern of the vessel, and this difference might give considerable more effect to the dumping of the cargo into the forward hatch than into the after hatch.

There is nothing, therefore, we say, improbable in the master being satisfied by the soundings that he was mistaken, and that, after all, her tipping forward was caused by the way the cargo went in, and if the master is believed and if it be true as testified by the master, that he spoke of this matter to Speaker, and that Speaker said she was not aground, that would aid in producing the conviction in the mind of the captain, especially after he had sounded, that she was afloat, because Speaker knew more than he did about the quantity of stone put into the respective hatches.

Moreover, Mr. Speaker's conduct, in any view of the matter, tends strongly to show that he thought the vessel was in no danger Saturday evening. Mr. Smith has testified that on Saturday morning he told Speaker to be sure that the master was satisfied that the vessel lay all right over Sunday (p. 316, fol. 559).

"Q. Did you direct Mr. Speaker on Saturday to "breast the *Tobin* further out on that day?

"A. I didn't tell him positively as to just what to "do. I told him that I wanted the captain to be "satisfied that he was laying all right over Sun-"day."

In view of that strict order from Smith, it is inconceivable that Mr. Speaker, the foreman, should have intended to leave her where she was from Saturday night to Monday morning, with the iron chute still in the hatch, if he apprehended that she was in any danger from grounding, and this was certainly after the conversation between them about her touching or ebbing out, and after he knew that the captain thought she grounded. And yet it is certain that he sent his men away with the iron chute still in the hatch, the removal of which required the work of five or six of his men. It was not a thing for the captain to take out. It was a part of the machinery and apparatus of the appel-

(*a.*) The mere fact that a vessel may touch bottom at low tide, even if it were clear, as it is not, that the master may have thought this possible from Saturday's experience, is not of itself sufficient to suggest danger. Vessels constantly lie on the bottom without injury. What the appellants and their foreman had said to the master, as well as what they failed to say when it was proper for them to speak, naturally led him to believe there was no danger if she did touch bottom at low tide in this berth.

lants by which they loaded the vessel. The master and his crew were not called upon even to help in the removal of the chute. This shows that it was a matter wholly for the appellants to take care of. The admitted fact that after Speaker had let his men go the captain desired him to recall them, in order to take out the chute, shows that he did expect before the captain made this request that she would remain where she was with the chute still in her hatch till Monday morning. And his conduct shows either a total disregard of Smith's positive injunction to have the captain satisfied or that he thought she lay all right till Monday morning. All this tends strongly to confirm the captain's testimony that he was satisfied by the assurances of Speaker and by the soundings that she was all right, and tends to make it improbable that she was making water or that the captain said so. If such had been the fact known to both of them, the conduct of both would be inexplicable. Again on this point the captain is confirmed, and Speaker refuted by the memorandum and by appellants' answer (*ut supra*). The master was fully justified under the circumstances in apprehending no danger where Speaker, who knew or ought to have known the character of the bottom, was content to have the vessel lie where she was till Monday morning.(a) Again, there is a total absence of proof that Speaker advised the shoving out of the vessel, either immediately or on the next high tide, or at any time. So far as he was concerned, it was all left to be done on Monday morning, but the captain voluntarily and for the purpose of saving time requested these arrangements to be made in order that he might shove her out before Monday morning, if he saw fit and found it convenient. (b)

There are some details of evidence on which the master and Speaker contradict each other, but they do not seem to be material to the main question, which is, whether on that Saturday night, under circumstances then known to the master, there was

(b) Neither appellant was there on Saturday during working hours and Speaker was their representative (p. 369, fol. 661).

any such reason to apprehend danger and the case was so urgent that it was his duty to call up his crew at midnight, when there would be slack water, for the purpose of moving out the vessel. It seems clear upon the proofs that there was no such obvious danger or apparent danger or reason for apprehension on the part of the master, and that therefore this specification of negligence in the answer that he did not move her out into deep water when advised to do so, and did not place an additional scow between the schooner and the wharf, as urged to do, is wholly unproved.

3. The third and last specification of negligence is that the master did not pump out said schooner when found to be in a leaky condition and did not take measures to prevent her from sinking when it was known that she was leaking.

After breakfast on Sunday she undoubtedly was known to be in a leaky condition. They had just discovered it. She undoubtedly sprang a leak by settling down on the rock, as the tide fell Sunday morning. The proofs that she was not in a leaky condition or leaking on Saturday night have been all sufficiently referred to (*supra*, pp. 14, 50–54). That the master did all he could Sunday morning to save the vessel is perfectly obvious. He immediately put the pumps at work. The vessel was well provided with pumps, having three in number, forward, amidships and astern. They had no effect upon the leak; the water gained. The master then tried to get help from the outside, but found it very difficult to get any assistance. He hired some colored men to keep up the pumping. He attempted to get a fire engine or a steam pump, but failed to do so; and at noon, when she was full of water, the effort of pumping was given up and it was obviously too late to save her (*Hankins*, pp. 48–50).

This specification, so far as it relates to neglect of duty on Saturday night, to which it probably intended to refer, is wholly unproved, because she

was not then leaking, and as before in this brief explained and shown from the testimony, there was no reason for apprehension on the part of the master that she was likely to leak. The mere fact that the vessel may have touched or taken the ground at low tide on Saturday evening, was not in itself a circumstance naturally to alarm the master. Hundreds of vessels ground in a harbor or a berth without injury. In hundreds of berths there is little or no water at low tide, and the vessels lie in the soft bottom. It is the nature of the bottom which constitutes the danger, its unevenness and the fact that it is incumbered or obstructed with rocks or other hard substances, and not the mere fact of grounding. The fact that this was a rocky bottom is not claimed to have been communicated to the master—nor was he told of the effect of grounding on the *Baird*, although this was known to Smith and Speaker. No authority is shown for charging negligence against the master in not keeping a watch on deck when moored at a wharf, and nothing happened from the want of a watch that affects the questions in this case. There was nothing in the appearance of the vessel in the morning when the master came on deck about 6 or half-past 6, which indicated any danger. Nothing happened in the night to indicate danger. There was a watchman on the scows belonging to the appellants at this wharf working all night pumping the scows till 6 o'clock. Nothing attracted his attention about this vessel (*Kroom*, pp. 546-550).

If this witness is to be believed, the scow which Speaker says he provided to be put inside of the *Tobin* was not fit for the purpose. It was only partly unloaded and leaking badly (do., do.).

It is not necessary for the vindication of the master against the charge of negligence that the points on which he is in conflict with Mr. Speaker, should be decided in his favor, and without going into these disputed details, on facts proved by a

large preponderance of evidence the master was not chargeable with negligence.

It is true, however, with regard to all these specifications of negligence charged against the master, that the Courts below had before them conflicting evidence and the question of the credibility of witnesses, upon the determination of which their view of the case in favor of the master may have turned in whole or in part. The trial Court and the Court of Appeals are peculiarly the tribunals appointed for the determination of such questions of fact, and the Court below was fully justified in dealing with this question of the alleged negligence of the master, as the matter is summed up in the opinion of the learned Chief Justice (p. 696).

" And there is an entire failure of evidence to es-
" tablish the fact, as attempted to be shown by the
" appellants, that there was want of due care on the
" part of the master, and a failure to exercise proper
" supervision for the safety of the vessel while she
" was moored at the wharf for the purpose of being
" loaded."

VII.—*There is no basis in the evidence for the charge in the answer of the appellants that the greater part or any of the loss of which the libellants complain would have been avoided by a more prompt or skillful effort to raise and remove the vessel* (Answer, p. 19, fol. 29).

The efforts made by the master and owners and by Mr. Hagner, the attorney for the owners, to get the vessel removed, and the difficulties they encountered, are set forth in great detail in the testimony.

Hankins, pp. 50–55.
Endicott, pp. 213, 217–223, 233–236.
Burnett, pp. 184–192.
Hagner, pp. 174–177, 254.
J. B. Lord, pp. 149–151.

There was some not unreasonable delay before the owners were satisfied that it was their duty to remove the vessel. They then had great difficulty in finding proper persons to undertake the work. They first proposed to wreckers to raise and remove her. They got no offer better than $8,000, which, on consultation with the appellants, was rejected as unreasonable. They then pursued the policy of first taking out the cargo, and after a second attempt by Mr. Lord, this was accomplished before the 1st day of November, under the second contract with Lord, dated October 3d. She was then sold as a wreck, after being condemned by surveyors (Survey, p. 11). That she was a complete wreck and worthless is fully shown in the preceding points on the evidence. There is no proof whatever that by her remaining sunk as she was from the 6th of August to the 23d of November, she sustained any new injury. On the contrary, the evidence of those who repaired her is that she was in all other respects, except this break, a sound, strong vessel, notwithstanding the delay and her immersion in the salt water, but that by sinking on the rock she became a complete wreck and of no real value. The conclusion of the Court of Appeals on that point is well sustained by the evidence, as follows:

"After she had sunk, nothing remained to be done "but to get out the cargo, and to remove the wreck, "which the owners were required to do under the "statute. Under the circumstances of the case, we "see no ground for holding that the injury was "increased or the damages in any manner enhanced "by the delay in attempting to raise and remove "the vessel" (Opinion, p. 699).

The statute referred to by the Court was Stat. 1890, Ch. 907, Sec. 10; 26 Stats., p. 454, which was as follows:

"Sec. 10. That the creation of any obstruction, "not affirmatively authorized by law, to the navi-"gable capacity of any waters, in respect of which

" the United States has jurisdiction, is hereby pro-
" hibited. The continuance of any such obstruc-
" tion, except bridges, piers, docks and wharves,
" and similar structures erected for business pur-
" poses, whether heretofore or hereafter created,
" shall constitute an offense, and each week's
" continuance of any such obstruction shall be
" deemed a separate offense."

Then follows a provision imposing a penalty of fine and, or, imprisonment for every such offense.

POINTS.

I.

It being proved that the vessel was injured and wrecked in the bed of the river within the berth occupied by the vessel in front of the wharf of the appellants, and that the appellants assigned this berth to the vessel without any notice to or knowledge on the part of the master or owners of such obstruction, the appellants were liable by the maritime law as for a maritime tort for the resulting damages. And the evidence showing that appellants had notice of this obstruction they were clearly liable in this action, and even if they had succeeded in proving that they had no knowledge or notice, then they were liable upon the ground that they were guilty of negligence, and the want of reasonable care which the law required of them in not ascertaining the existence of the obstruction.

1. That this is a case of maritime tort and that the Court of Admiralty had jurisdiction is conclusively shown by the case of *Philadelphia, Wilmington & Baltimore Ry. Co., appellants*, v. *Phila. & Havre de*

Grace Steamboat Co., 23 *How.*, 209. In that case the appellants were authorized by a statute of Maryland to construct a bridge over the mouth of the Susquehanna River at Havre de Grace. They entered into an agreement with certain contractors to prepare the foundations and erect piers. In pursuance of this contract these persons drove piles, called "sight piles," in the channel of the river under the direction of the engineers employed by the appellants. Before the completion of the contract the appellants abandoned their purpose of completing the bridge and discharged the contractors. The piles were not removed or cut off level with the bottom, but were cut a few feet under the surface of the water, so that they became a hidden and dangerous nuisance. The steamboat *Superior* left her port in Maryland and came into collision with one or more of these piles, in consequence whereof she suffered damages for which the libel was filed. It was held by this Court, *first*, that the liability of the Courts of Admiralty in tort depends wholly on locality. *Secondly*, that "torts" are not limited to wrongs or injuries committed by direct force, but include wrongs suffered by the negligence or malfeasance of others, where the remedy is by an action on the case, citing as a rule of admiralty law from the earliest days, that if a ship runs foul of an anchor left without a buoy, the person who placed it there shall respond in damages" (see 1 Emerigon, p. 417; Consul de la Mer, Ch. 243; Clerac, 70).

2. In *Carleton* v. *Franconia Iron & Steel Co.*, 99 *Mass.*, 216 (1868), the case was tort for injury to plaintiffs' schooner by being sunk and bilged in the dock adjoining defendants' wharf. The defendants' owned and occupied a wharf fronting on navigable waters in Wareham River, where the tide ebbed and flowed. The defendants had dredged out the adjoining dock for berths for vessels which were accustomed to come with iron and coal for the defend-

ants' foundries situated on the wharf. There was no other proof of ownership by the defendants. There was and always had been "a large "rock sunk in the water and thereby con- "cealed from sight, dangerous to vessels, and "so situated that a vessel of the draft "to which the water at said wharf was adapted, "being placed at high water at that part of the "wharf, would lie over the rock, and by the ebb of "the tide would settle down and rest upon the "same."

The defendants had notice of the existence and position of the rock and of its danger to vessels (the same having been pointed out to their superintendent in 1864, two years before the injury), but they neglected to notify the plaintiffs.

The plaintiffs' vessel came to the wharf in 1866 by procurement of defendants, bringing a cargo of iron for them under a verbal charter.

Gray, C. J., after laying down the rule of law that the owner or occupant of land is liable in damages to those coming to it, using due care, at his invitation or inducement, for an injury occasioned by the unsafe condition of the land or of the access to it, which is known to him and not to them, and which he has negligently suffered to exist and has given them no notice of, says:

"It does not, indeed, appear that the defendants "owned the soil of the dock in which the rock was "embedded; but they had excavated the dock for "the purpose of accommodating vessels bringing "cargoes to their wharf; and such vessels were ac- "customed to occupy it, and could not discharge at "that point of the wharf without doing so. * * * "Even if the wharf was not public but private, and "the defendants had no title in the dock, and the "concealed and dangerous obstacle was not created "by them or by any human agency, they were still "responsible for an injury occasioned by it to a "vessel which they had induced for their own bene-

" fit to come to the wharf, and which, without " negligence on the part of its owners or their " agents or servants, was put in a place apparently " adapted to its reception, but known by the de- " fendants to be unsafe. This case cannot be dis- " tinguished in principle from that of the owner of " land adjoining a highway, who, knowing that " there was a large rock or a deep pit between the " traveled part of the highway and his own gate, " should tell a carrier bringing goods to his house " at night, to drive in, without warning him of the " defect, and who would be equally liable for an " injury sustained in acting upon his invitation, " whether he did or did not own the soil under the " highway."

In *Nickerson* v. *Terrell*, 127 *Mass.*, 236 (1879), the case was that of the plaintiff's vessel being injured at the defendant's wharf by grounding in the muddy bottom which was in ridges caused by other vessels lying there, and possibly by coal and other hard substances in the river bottom. The tide left the dock bare at low water; vessels then lying in the mud, as the master of plaintiff's vessel knew. The question was whether the defendant had exercised due care in regard to the condition of the dock. The vessel was wider than vessels that usually lay there, but this was not shown to be known to the defendant. *Morton, J.:* " The general rules of law applic- " able in cases of this character are well settled. " The owner or occupant of a dock is liable in " damages to a person who, by his invitation, ex- " press or implied, makes use of it, for an injury " caused by any defect or unsafe condition of the " dock which the occupant negligently causes or " permits to exist, if such person was himself in " the exercise of due care. Such occupant is not " an insurer of the safety of his dock, but he is re- " quired to use reasonable care to keep his dock in " such a state as to be reasonably safe for use " by vessels which he invites to enter it, " or for which he holds it out as fit and

"ready. If he fails to use such due care, "if there is a defect which is known "to him, or which by the use of ordinary care and "diligence should be known to him, he is guilty of "negligence and liable to the person who, using due "care, is injured thereby (*Wendell* v. *Baxter*, 12 "Gray, 494; *Carleton* v. *Franconia Iron & Steel* "*Co.*, 99 Mass., 216; *Thompson* v. *Northeastern* "*Railway*, 2 B. & S., 106; *Mersey Docks* v. *Gibbs*, "L. R., 1 H. L., 93).

"In the case at bar, there was conflicting evi- "dence as to the state of the dock, and as to the "cause of the injury to the plaintiff's vessel, and "the presiding judge was required to submit the "case to the jury. He did so, with instructions "which are in substantial accordance with the rules "stated above."

And in respect to the degree of care required of the master or vessel owner, the Court says (p. 240):

"The true rule was stated to the jury, that the "master was bound to use ordinary care, and could "not carelessly run into danger. We cannot say, "as matter of law, that he was negligent because "he did not examine or measure the dock and berth. "It was for the jury to determine whether the con- "duct and conversation of the defendant excused "the master from making any more particular ex- "amination than he did make, and whether, upon "all the evidence, he used such care as men of or- "dinary prudence would use under the same cir- "cumstances."

The same rule was declared in a case of knowledge of the defect by the wharf owner in *Barber* v. *Abendroth*, 102 N. Y., 406. And in *Sawyer* v. *Oakman*, 1 Low. Dec., 134, knowledge on the part of the wharf owner was presumed by the Court from the obstruction, a heap of coal, having existed several days, and from another defect, inequalities of the bottom, having existed several years. And in the same case on

appeal the decree below was affirmed, on this presumption, by *Woodruff, C. J.*, citing *Phila., &c., R. R. Co.* v. *Phila., &c., Steamboat Company*, 23 How., 209; *Parnaby* v. *Lancaster Canal Co.*, 11 A. & E., 223; *Mersey Docks Co.* v. *Gibbs*, 1 H. L., 93, which cases are hereinafter referred to.

In *O'Rourke* v. *Peck*, 40 Fed. Rep., 907, *Wallace, J.* (1887), held that the wharf owner is not excused by the fact that the vessel comes not on his invitation but on the invitation of another party by his permission or license.

In *Christian* v. *Van Tassel*, 12 *Fed. Rep.*, 884 (1887), *Brown, J.*, held both parties at fault, the wharf owner for allowing the obstruction to remain, and the vessel for not noticing her condition when she grounded, and accordingly the damages were divided.

In the *Stroma*, 50 *Fed. Rep.*, 557 (*C. Ct. of App., 2d Circuit*, 1892), where the injury by a sunken wreck was known to both parties to exist and where the wharf owner's agent saw the vessel go to the place over the wreck and made no objection, it was held that the agent of the vessel was justified, although he knew the wreck was there, in assuming that the respondent's agent knew better than he did whether it was safe to berth her there or not; that the wharf owner should have satisfied himself it was safe before permitting her to berth there. (a)

In *Leonard* v. *Decker*, 22 *Fed. Rep.*, 741 (1884), it was held by *Brown, J.*, that the owner of the wharf was liable for a defect which he knows or *ought* to know of. In that case the defect in the wharf was in bolts left in the sides of the wharf where some timbers had been removed; the vessel came in contact with these bolts, and on the subject of jurisdiction which was raised in that case, *Brown, J.*, says:

> " It must appear that the *damage* as the substan-
> " tial cause of action arising out of the negligence
> " ' is complete within the locality upon which the
> " jurisdiction depends, namely, upon the high seas

(a) Upon all the facts this Court held the Wharfo
not negligent in not discovering the hidde
danger which caused the damage (166 U.

" or navigable waters.' *The Plymouth*, 3 *Wall.*, " 36."

In *Pennsylvania R. R. Co.* v. *Atha*, 22 *Fed. Rep.*, 920, *D. C., N. J.* (1885), *Nixon, J.*, reiterates the rule laid down in 127 *Mass.*, as above, that the wharf owner is liable for what is known or, in the exercise of ordinary prudence and diligence, should be known.

The English cases, both at common law and in admiralty, lay down the same rules.

In *Thompson* v. *N. E. R. R. Co.*, 2 *B. & S.*, 106; *S. C., Exch. Ch., do.* 119 (1860), it was held to be the duty of proprietors of a dock opened for public use for profit, to take reasonable care to make their dock and basin safe for navigation before they open them to the public; and that it was no defense that the plaintiffs knew of the condition of the access to the dock, provided that the plaintiffs were not chargeable with want of ordinary prudence in exposing their vessel to the danger. As *Cockburn, C. J.*, puts it:

" Where danger has been created by the wrongful " or negligent act of another, if a man in the perform- " ance of a lawful act voluntarily exposes himself " to that danger he is not precluded from recover- " ing for injury resulting from it, unless the cir- " cumstances are such that the jury are of opinion " that the exposing himself to that danger was a " want of common or ordinary prudence on his " part" (citing *Clayard* v. *Dethwick*, 12 *Q. Bench*, 439; *S. C.*, 64 *Eng. Com. L. Rep.*, 437, which fully sustains the ruling).

The case of the *Mersey Docks Trustees* v. *Gibbs*, *L. R.*, 1 *Eng. Ir. App. Cas.*, 93 (1866), was a review by the House of Lords of two judgments for plaintiffs for damages for defect in dock (*S. C.*, 11 *H. L. Cases*, 686). In one case the owner of the wharf knew of the defect; in the other the finding is that *he had the means of knowing of it, but was*

negligently ignorant of it. It was held that there was no error in either case.

In the case of the *Calliope, App. Cases* (1891), 11, reported below, 14 *P. D.*, 128, the wharf owner was held not liable for want of evidence of any negligence on his part upon the proofs, and also on the ground that the master and the pilot in charge of the vessel voluntarily took upon themselves the risk incurred by attempting to berth her when and where they did, but the opinions of the law lords fully recognized the principle that a wharf owner who invites the vessel to come to his wharf on his business is guilty of negligence if a hidden danger in the berth exists which he might by reasonable diligence have discovered. They held with and approve the case of *The Moorcock*, 14 *P. D.*, 64, where *Lord Escher, M. R.*, thus states the principle:

"The appellants, wharf owners, can find out the "state of the bottom of the river close to the front "of their wharf without difficulty. They can sound "for the bottom with a pole or in any way they "please, for they are there at every tide, and "whether they can see the actual bottom of the "water at low water is not material. Supposing "at low water there are two feet always over the "mud, this would make no difference. Persons "who are accustomed to the water do not see the "bottom of the water with their eyes; they find out "what is there by sounding, and they can feel for "the bottom and find out what is there with even "more accuracy than if they see it with their eyes, "and when they cannot honestly earn what they "are desiring to earn without this, it is implied that "they have undertaken to see that the bottom of "the river is reasonably fit, or, at all events, that "they have taken reasonable care to find out that "the bottom of the water is reasonably fit for the "purpose for which they agree that their jetty "should be used, that is, they should take reasonable "care to find out in what condition the bottom is

" and then have it made reasonably fit for the pur-
" pose, or inform the persons with whom they have
" contracted that it is not so. That, I think, is the
" least that can be implied as their duty " (14 *P. D.*, 67).

And to the same effect see, *The Calliope*, *L. R.*, *App. Cases* (1891), by *Lord Halsbury*, approving *The Moorcock*, *p.* 14.

To the same effect, *Lord Watson*, *pp.* 21, 22 *and* 23.

To the same effect, *Lord Herschell*, *pp.* 27, 28 *and* 29.

Applying these authorities to the present case, it is evident that the wharf owner is liable, *first*, because of the actual knowledge of Charles G. Smith, Junior, as found by the Court below, which finding is fully sustained by the evidence of the actual notice to him of the existence of the obstruction at the time of the grounding thereon of the schooner *Baird*. *Secondly*, that both of the appellants are presumed to know the condition of the bottom of the dock in front of their wharf from having used it for several years. Such presumption held by the Court in the cases before cited rests upon *their duty to find out what the bottom was*. One of the appellants, Charles G. Smith, Senior, although having equal opportunities to find out the condition of the bottom and an equal duty to do so, has not denied his knowledge. He was not called as a witness. As to him, therefore, the cases in which the courts have indulged this presumption are controlling, and his knowledge is the knowledge of his partner. *Thirdly*, the master having been shown to have had no knowledge of the obstruction and having been cautioned only to sound *around the vessel*, and having done so, is, on the authorities above cited, wholly free from contributory negligence in the placing of his vessel. *Fourthly*, the evidence being clear that on Saturday night the master apprehended no danger to the vessel, and having no reason to apprehend danger from the mere fact of the possibility of

her grounding, in view of what he knew of the condition of the bottom, he was also free from contributory negligence in waiting till Monday morning, or the high tide of Sunday afternoon, before shoving out the vessel and putting in another scow.

II.

The vessel being a total loss, the appellants were liable for her value, and also for the reasonable expense incurred by them in raising and removing her.

1. The question of value was much debated below. It was the subject of a difference between the Special Commissioner and the trial Judge. It was carefully reconsidered by the Court of Appeals, who say in their opinion, that the Court below did not exceed the reasonable limits of indemnity according to settled principles of law in the sums awarded (Opinion, p. 699).

2. The appellees called before the Commissioner two witnesses to value, both of whom were well acquainted with the vessel. *Endicott*, who was one of the owners, and perfectly familiar with her history and earnings, valued her at $10,000 (*Endicott*, *p.* 602). She had originally cost, nineteen years before, $30,000 (*p.* 601). He testified that at the time she was lost there was a fair market for vessels (*p.* 604, (*fol.* 1084); that he was largely interested in vessels himself, having an interest in about 58 or 60 (*do, do*); that a considerably smaller vessel then building for the owners would cost, when completed, $16,000 to $17,000 (*p.* 605, *fol.* 1085); that he based his estimate of value upon the general condition of the vessel and upon her earning capacity; that she had earned for her owners for five years past, fully

$2,000 a year clear of all bills and running expenses (*p.* 605, *fol.* 1086).

When examined afterwards in open Court he testified further that, comparing the *Ellen Tobin* with the vessels he bought in and built in in the year 1893, *the reasonable market value* of the *Ellen Tobin* in 1893, just before her wrecking, was $25 a registered ton, which would be a little over $10,000 (*p.* 662, *fol.* 1192); that she was a desirable size for a great many lines of business and useful in that way; that she was desirable in the line of business in which she was engaged (*p.* 663, *fol.* 1193); that vessels engaged in the off-shore business, that is, foreign business, could not be fairly classed and compared in value to schooners like the *Tobin*, because they came in competition with English vessels, which were allowed to engage in foreign, but not in the coastwise trade (*pp.* 663, 664, *fol.* 1194); that the *Tobin* was well built, first-class in every respect, of heavy timbers, well fastened, of good lumber; that there was a good fair market for vessels of that class at that time (*pp.* 664, 665, *fol.* 1196); that within 7½ years $13,000 had been expended in repairs on the *Tobin* (*p.* 665, *fol.* 1197); that at the time of her loss she was not in need of any repairs (*p.* 666, *fol.* 1198). On *cross-examination* he testified that the vessels he bought in in 1893 were the *Jesse W. Starr*, 292 *tons;* the *George Churchman*, 268 *tons;* that they were built in the same year with the *Tobin* (*pp.* 666, 667, *fol.* 1200); that the *William B. Steelman*, within five tons of the *Tobin*, and, like her, a double-decker and a centre board vessel, sold in 1893 for $8,000 (*p.* 668, *fol.* 1202).

John S. Mathis, a shipbuilder, testified that to build the *Ellen Tobin* in 1893, would have cost about $30,000 (*p.* 671, *fol* 1208); that the fair market value of the *Tobin* in August 6, 1893, would have been $10,000 (*p.* 672, *fol*, 1210); that she was fairly worth that, comparing her with the vessels named in Mr. Endicott's list, being a list of vessels bought in and built in by Endicott (*Exhibit*, *p.* 652; *Endicott*, *p.*

652, *fol.* 1173); that the list showed the *George Churchman* built in 1874, bought in May, 1893, tonnage 268, price $8,000; the *Gracie D. Chambers*, built 1875, tonnage 360, bought July, 1890, $17,000; the *William B. Steelman*, built July, 1875, tonnage 419, bought July, 1892, $8,000; the *Jesse W. Starr*, built in 1874, tonnage 292, bought July, 1893, $7,200.

The witness on cross examination showed a large experience in building and owning vessels, and testified further that he fixed the market value at $10,000 by comparing it with other vessels of the same dimensions, "that is, what we value them at and what they have been sold for lately, within the last 4 or 5 years" (*p.* 681, *fol.* 1226).

Endicott testified that he bought in May, 1890, one thirty-second in the *Ellen Tobin* for $280, which is at the rate of $8,960, at public auction (*p.* 621, *fol.* 1115).

The appellants called eight witnesses:

Crowell, a marine adjuster and appraiser, from Baltimore (*p.* 609), who, upon the *Ellen Tobin* being described to him, testified that in his opinion she was reasonably worth in August, 1893, $3,200 (*pp.* 610, 611).

Clarridge, also of Baltimore, a ship chandler and grocer, and who had owned some vessels, barks, ships, brigs and schooners, and who had seen the *Ellen Tobin*, but not for a number of years, testified that a vessel of that description, supposing her to have been in good order, was reasonably and fairly worth in August, 1893, $2,500 (*p.* 611, *fol.* 1098; *p.* 612, *fol.* 1099). He testified that the market in August, 1893, for vessels of the class of the *Tobin* was very poor; that vessels have not been making any money, and that he was not getting any profit from his own (*p.* 613, *fol.* 1100).

Gilkie, a master mariner, who had seen the *Tobin* once in Philadelphia some years before—ten or twelve years—answered from the description given to him that she was reasonably and fairly worth from $2,500 to $3,000; that that would be a fair

market value for her if sold (*pp.* 615, 616, *fol.* 1105); that he based his opinion upon the fact that she could be built for $18,000 now, all ready for sea.

Bennett, a shipwright, of Washington, testified that he saw the *Ellen Tobin* when lying at the bottom at Georgetown, with stone in her (*p.* 626, *fol.* 1124). He was examined with regard to the probable cost of repairing her and testified that in his opinion she could not have been repaired for $5,000 (*p.* 627, *fol.* 1126). He did not testify as to her value before the injury.

Martin, a witness much relied on by the appellants, was a marine surveyor for the New York Board of Underwriters (*p.* 630). He was in the habit of valuing vessels for purposes of general average, but not often old vessels, as there were other surveyors who did that (*p.* 630, *fol.* 1131). He had no recollection of ever seeing the *Tobin*. In answer to the question containing her description as taken from the record, he was unable to say whether there was a general demand or market for vessels of her class in August, 1893; that the market generally for vessels of all classes was very dull and had been for some years (*p.* 631, *fol.* 1133); that the adjusters *used to have a rule some years ago*, allowing 5 per cent. depreciation up till ten years of age, and after that something about 3 per cent.; that he would consider the vessel at ten years old worth half the original cost, and at twenty years a quarter or about that (*p.* 632, *fol.* 1134); that in his judgment $10 a registered ton would be a fair value for her (*p.* 631, *fol.* 1133); that his opinion of valuation at $10 a ton was based upon the sales of vessels about that time, within a year of it (*p.* 632, *fol.* 1134); that assuming that the vessel cost originally $30,000, and had been kept up well during her life from 1874 to 1893, he thought she would be reduced in value to one-quarter in twenty years (*p.* 634, *fol.* 1137); that he knew of no vessel of the class of the *Tobin* sold in 1893, that is, not of her tonnage, or for a good while (*p.* 644, *fol.* 1138).

The witness was unable to give an opinion as to the value of a vessel of the class af the Tobin, substantially new in 1893 (*p.* 637, *fol.* 1144).

Melbourn P. Smith, of Brooklyn, a ship broker and ship owner in a small way, had had no actual transactions showing the market value of vessels of the class of the *Tobin* in August, 1893 (*p.* 638, *fol.* 1146). The vessel being in general terms described to him, he said, "I should set the value of vessels of that description from $7 to $10 a ton on the register, according to the condition they might be in." If in good condition, $9 a ton (*p.* 639, *fol.* 1147). He gave an account of vessels which he bought as a broker, some of which were as follows:

Schooner *D. D. Haskell*, 1891, 317 tons; built in 1881; $5,000. The *H. J. Cottrell*, built in 1882; 336 tons; $6,000. The bark *Jose D. Bueno*, 398 tons; built in 1875; bought in 1893; $5,200 (*p.* 640, *fols.* 1148, 1149).

Jones, of Brooklyn, a shipwright; had never seen the *Ellen Tobin*. A general description being given to him, he said he thought he would put her fair and reasonable value at about $10 a ton (*p.* 643, *fols.* 1154, 1155).

Johnson, one of the assessors of the District of Columbia, who had not been interested in any vessel over 300 tons, and who had never taken any particular notice of the *Ellen Tobin*, but had seen her on the railway and going down the river, thought she might be worth from $4,000 to $5,000 (*pp.* 648, 649).

The valuation put upon the vessel by the seven of these witnesses who alone give any estimate of her value, varies from $2,500 to $5,000. Their testimony is not based upon any particular knowledge of the vessel herself. The more intelligent among the witnesses, especially *Crowell* and *Martin*—*Crowell*, who valued her at $3,200, and *Martin*, who valued her at $4,130—were engaged in the business of valuing vessels for underwriters. The very nature of their business was such as to incline them

to low valuations. Such witnesses are always very conservative in the matter of value. But applying one of the rules which *Mr. Martin* said prevailed among the underwriters, to the *Ellen Tobin*, namely, that a vessel kept in good condition was worth a quarter of her original cost after twenty years, her valuation would be something over *$7,500*. He also frankly admitted that he could not give any estimate of what she would have been worth if substantially new. This seems to show that he was not well acquainted with the market value, because if any kind of vessel has a market value it would seem to be new vessels of a particular class.

The witness *Clarridge*, who put the lowest value upon her, $2,500, seems to have been very unfortu nate himself as a vessel owner about that time. He says he got no profits out of vessels. Comparing him with the other witnesses called by the appellants, his judgment seemed to be very much affected by that circumstance.

The witness *Gilkie*, who had no special knowledgs of the market for vessels, makes the very absurd answer on the subject of value: "For me she would not be worth anything, only what she would be struck down for at a sale of old junk, but she might bring $3,000 possibly." He also underrates the probable cost of such a vessel at the time he testified, at $18,000, which is not supported by the testimony, and he very frankly says that he only knew the value in 1893 in a general way, and not from having any actual transaction in vessels of her class (*p.* 638, *fol.* 1146).

The witness *Jones*, a shipwright, had had no dealings in or known of no dealings in vessels of her class, but only of smaller vessels.

The details with regard to the vessels of whose sale he did know in Brooklyn are not sufficient for the purpose of a comparison between those vessels and the "*Tobin*."

The witness *Johnson*, who valued her at from

$4,000 to $5,000, also had special experience in smaller vessels.

While the general rule is admitted to be that the value to be shown is *the market value, provided the vessel is of a class which has a market value* (The "*Baltimore*," 8 Wall., 377), yet ships have an individuality, and even if there is something approaching a standard market value for ships of a particular kind, it is seldom that two vessels bought and sold are exactly alike, and there is room for considerable difference of opinion among witnesses upon the question of even the market value of a particular vessel. The evidence is not very clear in this case that in 1893 there was what could be called a standard of value or market value for vessels like the "*Ellen Tobin*," especially for that kind of a vessel of her age.

The question of value seems to have received very full consideration in the courts below, and is one peculiarly fit for the determination of the trial Court. In this case the trial Judge, not being satisfied with the conclusion and rulings of the auditor, took the testimony of some of the witnesses in open court on this question of value. The Court was not bound to accept the valuation of any witness, and did not decide in favor of the extreme views of either party. The Court may be deemed to have taken into consideration the natural bias which many of the witnesses for the appellants, acting in the ordinary course of their business for insurance companies, would have in favor of low valuations; and upon the whole evidence the final conclusion of the Court that the vessel was worth $8,000 is fully sustained by the proofs taken on the reference.

There was, however, other evidence of her value in the record. Several competent witnesses had also testified, on the original hearing, to a value of $10,000 without objection (*Kensel*, p. 128, fol. 214; *Davey*, p. 182, fol. 315; *Barnett*, pp. 185, 186, fol. 321).

Another witness testified to the same value under objection. As his valuation was based on his

knowledge of the vessel two years before, that would seem to have been the ground of objection (*Gokey*, p. 134, fol. 226).

3. The Court properly allowed the expense actually incurred in removing the cargo, less the $100 received by the owners on her sale, and receipts for boat, &c. The statute hereinbefore referred to made it the duty of the owner to remove the wreck, and the appellees, after inquiry on the part of their counsel, were so advised (*Hagner, p.* 174).

The removal of the vessel itself cost the owners nothing, but it could not be effected till after the cargo had been taken out.

This statute seems to have made it equally incumbent upon the appellants, who were the cause of the stranding of the vessel, to remove her. This expense was clearly a part of the damage sustained by the appellees and rightly included in the decree.

It seems also that the owner would have been liable for any possible damage that might have happened from the vessel breaking up or being carried away and doing damage to the bridge or to other vessels (*Hagner, p.* 254). And this liability also justified them in removing the cargo and providing for the removal of the vessel.

III.

The cross-libel was properly dismissed, first, for want of proof of the allegations of negligence, and, secondly, because the statute equally imposes the duty upon the appellants by whose act and negligence the wreck was caused. It was their own fault that their business was interfered with.

IV.

The rule was well settled when this Court was in the habit of hearing appeals in admiralty cases, that where both of the Courts below concurred in their conclusions of fact, the burden was upon the appellant to make out clearly that such findings were without evidence or were clearly against the weight of evidence.

The "Baltimore," 8 *Wall.*, 382.
The "Lady Pike," 21 *Wall.*, 8.
The Ship "Marcellus," 1 *Black*, 417.

With this rule has gone along another rule, that where the facts found below and concurred in by both Courts have been found upon conflicting evidence, this Court would not reverse if there was evidence to support the decree. Thus in the Philadelphia, Wil. & Balt. Ry. Co. v. *Phila. & Havre de Grace Steamboat Co.*, 23 *Howard*, 217, *the Court say:*

"Some objections have been urged to the assess-
"ment of damages and their amount. On this sub-
"ject there was much contradictory testimony, as
"usually happens when experts are examined as to
"matters of professional opinion. The judges of
"the courts where this question was tried, can bet-
"ter judge of the relative value of such conflicting
"testimony, from their knowledge of the places
"and persons, and they may examine witnesses *ore*
"*tenus* if they see fit. There was evidence to sup-
"port the decree, and we can see no manifest error
"into which the Court below has fallen. Appel-
"lants ought not to expect that this Court will re-
"verse a decree merely upon a doubt created by
"conflicting testimony."

And in the case of *The S. B. Wheeler*, 20 *Wall.*, 386, the Court say:

"Questions of fact only are presented by this "appeal. There is no dispute as to the law. Two "courts have already found against the appellants. "It has been over and over again ruled by this "Court that under such circumstances the burthen "is on the appellant to show the error. Every pre- "sumption is in favor of the decrees below. We "ought not to reverse unless the error is clear. "Such is not the case here. It is indeed urged that "the claimants, by their own proof, established the "fact that there was no lookout at the bow of the "*Wheeler* when the collision occurred. This is so, "but whether that was a contributing fault was a "question of fact, and that has been twice found "against the appellants. We are entirely satisfied "with all the findings."

In the present case the evidence was conflicting upon every issue of fact involved in the controversy. There was evidence to sustain every fact found by the courts below and, upon the application of the foregoing authorities, the appellants have not sustained the burthen that is upon them as regards the facts. This is true of the question of contributory negligence of the vessel as well as of the question of the negligence of the appellants.

V.

There having been no findings of fact by the Court of Appeals, this Court cannot consider or enquire into the facts, but has only to determine whether upon the record there is error.

By the 8th section of the Act of February 9, 1893, creating the Court of Appeals of the District of Col-

umbia (27 *Stats.*, 434), "any final judgment or de-
" cree of the Court may be re-examined and af-
" firmed, reversed or modified by the Supreme
" Court of the United States, upon writ of error or
" appeal in all causes in which the matter in dispute
" exclusive of costs shall exceed $5,000, in the same
" manner and under the same regulations as hereto-
" fore provided for in cases of writs of error on judg-
" ment or appeals from decrees rendered in the Su-
" preme Court of the District of Columbia."

By Section 10 of the same Act the opinion of the Circuit Court of Appeals was to be in writing and filed as part of the record.

By Section 11 of the Act of March 3, 1863 (12th *Stats.*, *Chap.* 91, *p.* 764), establishing the new court to be known as the Supreme Court of the District of Columbia, it was provided "that any final judg-
" ment, order or decree of said Court may be re-ex-
" amined, reversed or affirmed in the Supreme
" Court of the United States upon writ of error or
" appeal in the same cases and in like manner as is
" now provided by law in reference to the final
" judgment, orders and decrees of the Circuit
" Court of the United States for the District of
" Columbia."

The Act of February 27, 1801, (2 *Stats.*, *Ch.*15, *p.* 103), which established a Circuit Court of the District of Columbia and provided that the said court and the Judges thereof should have all the powers by law vested in the Circuit Courts and the Judges of the Circuit Courts of the United States, gave the Court jurisdiction only of suits of a civil nature at common law or in equity, of crimes and offenses committed within the District, of seizures on land and water, and of penalties and forfeitures made arising or accruing under the laws of the United States. It gave no jurisdiction in admiralty. It provided, however, in Section 8, that "any final
" judgment, order or decree in said Circuit Court,
" wherein the matter in dispute, exclusive of costs,
" shall exceed the value of $100, may be re-exam-

" ined and reversed or affirmed in the Supreme " Court of the United States by writ of error or ap- " peal, and shall be prosecuted in the same manner " under the same regulations, and the same pro- " ceedings shall be had as is or shall be provided in " the case of writs of error on judgments or appeals " upon orders or decrees rendered in the Circuit " Court of the United States."

By the 24th section of the act to amend the judicial system of the United States, passed on the 29th day of April, 1802 (2 *Stats. Ch.*, 31, *Sec.* 24, *p.* 166), the Chief Judge of the District of Columbia was authorized to hold a District Court of the United States in and for said District with the same powers and jurisdiction vested in the district courts of the United States. And the admiralty jurisdiction thus granted was continued in the Supreme Court of the district by the Act of 1863, § 3, to be held by any one of the Justices (12 Stat., p. 763).

From these statutes it will appear that from 1802 to 1863 writs of error and appeals from the Circuit Court of the District to this Court were to be taken in the same manner and under the same regulations, and the same proceedings to be had therein as was from time to time provided in the case of writs of error upon judgments or appeals from orders or decrees rendered in the circuit courts of the United States. The language of the statute is " *the same as is or shall be provided.*" It made appeals and writs of error conform from time to time to the changes in the law relating to the Circuit Courts, but by the Act of 1863 the provision was altered and these proceedings were subject only to such provisions as at the date of the passage of the Act of March 3, 1863, were provided in cases of the Circuit Courts of the United States. But when the statutes of the United States were revised in 1874 the language was again altered. The revised statute took effect *June* 22, 1874, and Section *705* provided as follows:

"The final judgment or decree of the Supreme "Court of the District of Columbia in any case "where the matter in dispute, exclusive of costs, "exceeds the value of $1,000 may be re-examined "and reversed or affirmed in the Supreme Court of "the United States, upon writ of error or appeal, "in the same manner and under the same regula- "tions as are provided in cases of writs of error on "judgments, or appeals from decrees rendered in a "circuit court."

The word "*now*," which occurred in the Act of 1863 was omitted. The Act of 1863 made the practice in this regard, as it existed on the day of the passage of that act a permanent regulation. It is quite obvious that the intention of Section *705* of the Revised Statutes was to alter this provision. The object of the change apparently was to assimilate the practice in this respect of the Supreme Court of the District of Columbia to that of the Circuit Courts of the United States with which, up to 1863, the practice had always been assimilated.

While the language is not as explicit as that of the Act of 1802, it is sufficient. The acts establishing the Circuit Court of the District of Columbia, and the subsequent court, the Supreme Court of the District of Columbia, had provided as to jurisdiction and the powers of the Judges, that they should in general be the same as the powers of the Circuit Courts of the United States and of the Judges of those courts. There was no reason for fixing upon a particular point of time, March 3, 1863, as a period for establishing a method of practice which should be fixed and unalterable. Nor does Section *705* of the Revised Statutes show any such purpose with regard to the period at which the Revised Statutes took effect March 18, 1874. Every reason which required a change in the practice in the Circuit Courts of the United States would apply with equal force to the Supreme Court of the District of Columbia in respect to appeals and writs of error, and this is a

reasonable construction of Section *705* of the Revised Statutes.

If this view is correct then when by the act of February 16, 1875 (18 *Stats.*, 315), the Circuit Courts of the United States in deciding admiralty causes were required to make separate findings of fact and law and it was provided that on appeal to the United States Supreme Court the review should be limited to questions of law appearing on the record or presented by a bill of exceptions, this law became applicable to the Supreme Court of the District of Columbia as then organized, and the provision in the act of February 9, 1893, establishing the Court of Appeals of the District, that the final judgments and decrees of the Court of Appeals might be re-examined and affirmed, reversed or modified in the Supreme Court of the United States upon writ of error or appeal, &c., in the same manner and under the same regulations as heretofore provided for in cases of writs of error on judgments or appeals from decrees rendered in the Supreme Court of the District of Columbia made it necessary that the Court of Appeals of the District of Columbia should make findings of fact in order to enable this Court to review its decrees on questions of fact.

In the case *In re Cooper* (143 U. S., 511) it was held that the requirement of the Act of 1875, requiring findings applied to the District Court of Alaska, established under the Act of May 17, 1884 (23 *Stats. Ch.*, 53, p. 24). That act contains this provision:

"Writs of error in criminal cases shall issue to "the said District Court from the United States "Circuit Court for the District of Oregon in the "cases provided in Chap. 176 of the Laws of 1879, "and the jurisdiction thereby conferred upon Circuit "Courts is hereby given to the Circuit Court of "Oregon, and the final judgments or decrees of said "Circuit and District Court may be reviewed by the "Supreme Court of the United States *as in other "cases.*"

The Court interpreted these words "Circuit Court and District Court" to mean the Circuit Court of Oregon and the District Court of Alaska, so that the language was interpreted to read, "And the final "judgments or decrees of the said District Court of "Alaska may be reviewed by the Supreme Court of "the United States *as in other cases.*"

The act establishing the Circuit Courts of Appeals, being the Act of March 3, 1891 (26 *Stats. Ch.*, 517, p. 826), does not affect this question. It abrogated the provision of the Act of 1875, requiring findings to be made by the Circuit Courts of the United States, so far as applied to the Circuit Court of Appeals by making their decision in admiralty cases final, and these new courts were not within the terms of the Act of 1875, not being circuit courts of the United States. By giving an appeal from the District Court to the Circuit Courts of Appeal and making the decisions of the Circuit Courts of Appeal in admiralty cases final, the law of 1875, so far as the requirement of findings of fact was concerned, became inoperative in respect to the Circuit Courts of the United States in admiralty cases. They no longer had jurisdiction in admiralty cases.

By Section 14 of the Act of 1891 there is an express repeal of Section 3 of the Act of 1875. This express repeal of Section 3 would seem to imply that Sections 1 and 2, so far as they could still have force and apply to any existing courts, still remained in force, and if by reason of the statutes hereinbefore referred to the statute of 1875 was the law applicable to the Court of Appeals of the District of Columbia it is still a law as applied to that Court notwithstanding the Act of 1891—and it would seem that it still applies to appeals in admiralty from the District Court of Alaska.

In *Pioneer Fuel Co.* v. *McBrier*, 84 Fed. Rep., 496, Mr. Justice Brewer considered, without deciding the question, whether, since the Act of 1891, the Act of 1875 required findings by a District Court for the purposes of an appeal to the Circuit Court of

Appeals, and in the discussion he refers to the express repeal of the third section as bearing on the question of an implied repeal of other sections of the Act of 1875. He also says: "The purpose of the Act of 1891 was to distribute between the Supreme Court and the newly formed Courts of Appeal, the entire appellate jurisdiction from the Circuit and District Courts of the United States, and not to provide new modes of procedure." There have been a number of cases in the Courts of Appeal determining that for the purpose of an appeal in Admiralty from the District Courts to the Circuit Courts of Appeal, and also for the purpose of an appeal from the Circuit Courts of the United States to the Circuit Courts of Appeal, in the limited number of cases where the Circuit Courts had pending before them Admiralty appeals from the District Courts when the Act of 1891 took effect, the Act of 1875 did not require findings. But these cases seem to have little or no bearing on the present question. As to both those classes of cases it was apparent that they were not within the scope or reason of the Act of 1875, which was designed to regulate appeals from the Circuit Courts to this Court[a] (*The Havilah*, 48 Fed. Rep., 684; *The State of California*, 49 Fed. Rep., 172; *The E. A. Packer*, 58 Fed Rep., 252; *The Philadelphia*, 60 Fed. Rep., 425; *The Coquitlam*, 77 Fed Rep., 748; *Nelson* v. *White*, 83 Fed. Rep., 218; *Pioneer Fuel Co.* v. *McBrier, ut supra*, 84 Fed. Rep., 497.) As there was every reason why the practice of the Court of Appeals of the District of Columbia should be assimilated in this matter to that of the Circuit Courts of the United States, and that that statute of 1875 should apply to the Court of Appeals of the District of Columbia, there is every reason why, if consistent with the Act of 1891, the requirement for findings should continue in force in respect to the Court of Appeals of the District of Columbia, and this Court should have the benefit of findings of fact intended by the Act of 1875 to relieve this Court of the labor of

(a) "An Act to facilitate the disposition of cases in the Supreme Court of the U.S., and for other purposes."

going through these immense records in admiralty cases for the purpose of ascertaining the facts. This Court has several times called attention to the fact as entitled to weight in the construction of the Act of 1891,—that one of its principal purposes was to relieve this Court of excessive labor (*McLish* v. *Roff*, 141 U. S., 666; *Lau Ow Bew* v. *U. S.*, 144 U. S., 55; *Amer. Const. Co.* v. *Railway*, 148 U. S., 382). It would be a strange construction of the Act of 1891, designed to relieve this Court of such labor, that the effect should be in respect to appeals from any court that its labors of this very kind should be greatly increased. Such construction is not necessary, so far as this question is concerned.

Where the law requires a finding of fact to be made by the Court below and such findings are not made, the Court will not send the case back for findings, unless it appears that the want of findings was the fault of the Court itself, and this Court will proceed to determine the cause upon the record. In such cases it is presumed that the parties did not desire findings but desired to have their appeal heard upon the record alone.

The S. S. Osborne, 104 U. S., 183.

VI.

The decrees of the Supreme Court of the District of Columbia sitting as a Court of Admiralty and of the Circuit Court of Appeals should be affirmed, with costs to the appellees.

WM. G. CHOATE,
Of Counsel for Appellees.